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ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Globalization and its impact on the full enjoyment of human rights

**Progress report submitted by J. Oloka-Onyango and Deepika Udagama,
in accordance with Sub-Commission resolution 1999/8 and
Commission on Human Rights decision 2000/102**

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CONTENTS

		Paragraphs	Page
Introduction		1 - 3	3
I.	GLOBALIZATION AND ITS CONTINUING RELEVANCE TO THE UNIVERSAL AND FULL RESPECT OF HUMAN RIGHTS	4 - 13	4
II.	INTERNATIONAL ECONOMIC LAW AND THE REGIME OF INTERNATIONAL HUMAN RIGHTS: TENSIONS AND COMPLEMENTARITIES	14 - 53	7
	A. Globalization and the question of intellectual property rights	19 - 34	9
	B. Dispute resolution at the WTO	35 - 48	17
	C. Multilateral institutions and the phenomenon of poverty	49 - 53	23
III.	INTERNATIONAL HUMAN RIGHTS LAW AND ITS APPLICABILITY TO MULTILATERAL INSTITUTIONS: TOWARDS A RESTATEMENT	54 - 64	25
IV.	CIVIL SOCIETY AND GLOBALIZATION: ENHANCING THE POSITIVE, COMBATING THE NEGATIVE	65 - 71	30
V.	CONCLUSIONS AND RECOMMENDATIONS	72 - 75	32

Introduction

1. In its decision 2000/102 of 17 April 2000, the Commission on Human Rights, recalling Commission Resolution 1999/59 and taking note of resolution 1999/8 of the Sub-Commission on the Promotion and Protection of Human Rights, decided to endorse the appointment of Mr. J. Oloka-Onyango and Ms. Deepika Udagama as Special Rapporteurs to undertake a study on the issue of globalization and its impact on the full enjoyment of all human rights, paying specific attention to the recommendations made by the Sub-Commission and the Commission as to refining the focus and methods of the study.

2. At the fifty-second session of the Sub-Commission on the Promotion and Protection of Human Rights, the Special Rapporteurs presented their preliminary report on the subject.[1] In that report they drew particular attention to the institutional framework of the main agents of globalization, and the related questions of the effect of globalization on the situation of equality and non-discrimination, as major human rights issues confronting the world today. The report paid particular attention to the situation of women, and the various ways in which globalization has both enhanced and diminished their living conditions, within a context that reiterated the necessity for a holistic approach to the observation and protection of human rights. Among the multilateral institutions (MLIs) given specific consideration were the International Monetary Fund (IMF) and the World Bank. The report also made some preliminary observations about the World Trade Organization (WTO). Also of concern to the Special Rapporteurs was the role and function of the whole range of United Nations bodies and mechanisms and the manner in which they have sought to address the issue of globalization.

3. This progress report further develops the analysis of the earlier study. In the first instance, it updates and reviews particular conceptual and practical developments of importance in the arena of globalization. Critical among these is a synopsis of some of the unresolved tensions between international economic law and international human rights - the main regimes of law that are implicated in the debate about globalization. Drawing from this analysis, we revisit some of the most contentious issues dominating debates about globalization in international and regional forums, as well as among scholars, politicians and activists. These include the major developments relating to the issue of trade liberalization and intellectual property rights (IPRs) with a particular focus on the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS), as well as on some dimensions of the WTO dispute resolution mechanism.[2] It also provides a human rights review of the focus on poverty eradication at the MLIs, with particular attention paid to the Heavily Indebted Poor Countries (HIPC) initiative of the World Bank and the more recent Poverty Reduction and Growth Facility (PRGF) of the IMF.[3] The report considers the obligations of the MLIs under international human rights law and urges further measures that should be taken by them, by States and by the international community in order to enhance the positive aspects of globalization and to minimize its negative consequences. We conclude with a critical examination of the place of civil society in this discussion. As with our preliminary report, we are primarily concerned with the human rights dimensions of globalization and with the manner in which individual men and women are affected by it, while at the same time highlighting the role of States, non-State actors (NSAs) and international institutions that are critical participants in the continuing discussion of this issue.

I. GLOBALIZATION AND ITS CONTINUING RELEVANCE TO THE UNIVERSAL AND FULL RESPECT OF HUMAN RIGHTS

4. The phenomenon of Globalization continues to elicit considerable attention from policy makers, diplomats, activists and ordinary people.[4] Its range and impact is producing profound results on life in the twenty-first century. Virtually no area of human existence today is free from the varied consequences of globalization. As such, globalization is an issue that requires continuing scrutiny and attention by the international community.[5] While definitions of globalization are numerous and varied, for the purposes of this report the Special Rapporteurs consider that globalization is possessed of many attributes, characterized in the main by a highly increased integration of national economies on a world scale. It is motivated principally by developments in information and communications technology (ICT) and fostered by reduced barriers to global trade and the faster movement of capital. In this context, the actions and policies of non-State actors - from transnational corporations to the MLIs we examined in our last report - have assumed a particular significance. These include, inter alia, an emphasis on a reduced role for the State, the privatization of public enterprise, and the continuous deregulation of the economy.

5. What is the human rights framework relevant to the debate about those aspects of globalization with which we are most concerned? In our earlier studies, we elaborated a framework that emphasized four key platforms upon which the discussion of the link between human rights and the processes of globalization should be based, viz.,

(a) The International Bill of Human Rights, comprising the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR);

(b) More recent instruments designed to address the situation of special groups marginalized by history or status, such as those on women, children, indigenous people and the rights of minorities;

(c) Regional and subregional initiatives and contexts that are having an increasingly important role to play in the debate on economic liberalization and the promotion and protection of human rights; and

(d) The right to development - encompassed in the 1986 Declaration, but further enunciated at a number of world conferences, commencing with the World Conference on Human Rights in Vienna in 1993, stemming from which is the notion of the indivisibility, interconnectedness and interrelatedness of human rights.[6]

In sum, the processes of globalization impact on the whole corpus of human rights, from those of a processual nature to the substantive content of the rights that have been elaborated over the past half century, whether in treaties or under the rubric of customary international law. For the purposes of the ensuing analysis, it is also important to emphasize the fact that although human rights law is primarily concerned with the obligations of States, it does not exclude other entities.

6. From a human rights perspective, therefore, our main concern must be with the dichotomies that globalization has produced or enhanced, and the way in which these relate to the overall promotion and protection of human rights. On the one hand, through the ICT revolution, globalization has led to a veritable explosion of ideas and their transmission, giving vent to the right to free expression and the attendant right of access to information.[7] Similarly, the rate and pace of technological advancement in areas such as medical research, space exploration and biotechnological innovation are of tremendous significance. These provide increasing hope for the realization of a whole range of human rights, including the rights to health, food, and improved standards of living. Globalization has prompted a much greater movement of people - whether as migrants, students and scholars, or simply as tourists. Likewise, the interaction between different cultures, ethnicities and religions has been facilitated by the breakdown of geographical space and time. In short, many of the changes produced by globalization are palpable and positive for the overall respect for human rights.

7. Viewed more critically within a human rights framework, we are compelled to delve deeper and inquire: who has benefited from all the spectacular developments heralded by the processes of globalization? To what extent has globalization aided peasants, indigenous peoples, women and ordinary working people, to mention only a handful of the different categories with which the regime of human rights law is usually concerned? How has globalization improved the capacities of States, particularly those with low levels of human development and lacking in economic resources, to meet their basic and fundamental human rights obligations to their citizenry? Finally, are those institutions - whether local, national, regional or international - tasked with the function of protecting human rights equipped with the tools necessary to meet the challenges posed by the varied processes of globalization? Thus, in reviewing the global communications and technological developments heralded by those who can only see the bright side of globalization, it is also essential to remain cognizant of the fact that they are taking place in what can only be described as a sea of stark disparity. The persistence (and growth) of the problems of fatal disease, hunger, inadequate clothing, insufficient shelter, labour dislocation and the lack of food in many parts of the world is an increasing cause for concern. The growing competition for and exploitation of mineral and other natural resources are heightening tensions and conflicts, with the so-called "blood" diamonds (emanating from Sierra Leone and Angola) and the notorious Tantalite/Columbite (ColTan) in the Democratic Republic of the Congo heading the list. It is not by mere coincidence that these countries and others that are similarly situated are mired in the refugee crisis, globalization being one of the often-unacknowledged factors responsible for forced displacement and migration.[8]

8. Given these developments, the world today can be characterized by what one observer has described as "the concurrence of globalization and marginalization".[9] While one section of humanity is growing and developing - literally basking in the glow of globalization - the other wallows in increasing despondency and despair. The processes most closely associated with globalization are rife with contradictions.[10] For example, there is no doubt that conditions that subsist in "sweatshops" - subsidiary branches of transnational corporations (TNCs) located in developing countries and paying low wages to work long hours in often arduous conditions - have raised many human rights questions relating to the right to health, conditions of work and gender discrimination, to mention but a few of the issues that have elicited critical attention.[11] However, some observers have argued that sweatshops have been the engine of growth, development and prosperity in those countries (especially in South-East Asia) where they have

been deployed.[12] Conversely, although globalization is closely associated with the notion of free trade, many developed countries such as the United States and the members of the European Union (EU) maintain protectionist regimes and subsidies as basic instruments of economic policy. Developing countries, on the other hand, are being pressured to open up and liberalize their own economies. Ironically, such countries still face tremendous obstacles in attempting to access the economies of the developed world, especially in those sectors such as agriculture and textiles where they have a comparative advantage.[13]

9. Globalization has thus brought tremendous benefits, but it has also led to significant social dislocation, particularly in the developing areas of the world, and even in those parts of the world that are believed to have escaped the scourge of underdevelopment.[14] In thus examining this issue, we must recall that globalization is not simply a question of free trade, increased investments, and liberalized regimes of finance. Rather, the effects of globalization are manifest in a wide array of contexts - from the social and cultural, to the economic, environmental and political. Connecting the recent rise of sharia militancy in northern Nigeria in part to the growing influence of globalization, Ali Mazrui argues that "One of the repercussions of globalization is that it both promotes enlargement of economic scale and stimulates fragmentation of ethnic and cultural scale."[15] Thus, around the world, globalization is having varied impacts on society.

10. It is of considerable concern that the processes of globalization are taking place within a context of increased social tension and political discordance. A growing global movement of activists drawn from all walks of life are seeking to have their voices heard in the debate about the adverse consequences of globalization. Thus, Quebec became the latest in a line of cities starting with Seattle in November 1999 to be hit by protests against the diverse consequences of globalization.[16] This year, the near-spontaneous anti-globalization demonstrations in cities across the world on May Day (International Labour Day) illustrate that something is seriously amiss.[17] Viewed from a human rights perspective, the organization and operation of these movements and the retaliation against them raise numerous questions concerning the rights to free expression, assembly and association. Ultimately, they also raise questions about participation, exclusion and discrimination - features of the human rights regime that lie at the core of the many instruments that make up the human rights corpus. At a minimum, human rights activists must express concern at the manner in which such protests are being handled by State authorities, and the degree to which the institutions against which those protests are directed are manifesting a concern with the issues being raised by them.

11. Globalization is therefore not simply an issue of economics; it is very much a political phenomenon. Coming to grips with the politics of globalization is thus an essential prerequisite to the design of alternative structures of international economy and governance. Understanding the politics of globalization means that it is wrong to simply dismiss the anti-globalization protests as the machinations of disgruntled ex-hippies nostalgic for the heady days of anti-war protest.[18] For an appropriate response to the disparities that globalization has produced we need to look further, and recognize, to borrow the words of Balakrishnan Rajagopal, "... the Seattle resistance as the voice of millions of those who lose out in the trading game".[19] Many are the lessons to be drawn from the Seattle debacle, and its implications for future and ongoing discussions about the process of trade liberalization specifically, and the processes of globalization in general. The most important lesson is that there is an urgent need to pause and

critically reflect on the most appropriate manner to enhance the positive, and confront and eliminate the negative aspects of globalization. Only then can we ensure that the processes of globalization are sensitive to the goals of sustainable human development, of which the promotion and protection of human rights is paramount.

12. In the opinion of the Special Rapporteurs, the above developments illustrate that globalization is not divinely ordained, nor are its basic tenets foreclosed from negotiation; it is not "... a natural event, an inevitable global progression of consolidated economic growth and development".[20] Rather, the phenomenon of globalization is the product of human society. As such, it is motivated by specific ideologies, interests and institutions. In other words, globalization has no a priori or inevitable existence independent of the structures humankind has put in place. It then becomes essential to encounter and engage globalization while taking these factors into consideration. In this way, we can identify varied outlets for negotiating and reviewing its terms and consequences. In doing so, we must ask ourselves what the possibilities and the limitations presented by globalization are, and how we can strategically and creatively engage them. Most importantly, how do we ensure that in the discussion about globalization and its impact on human rights, we adhere to the principles of meaningful participation and inclusion in the decision-making processes that give shape and impetus to the phenomenon and recognize the diversity of views that seek an audience?[21] Whether speaking out in support of or against the phenomenon, those views are important in the quest for a more holistic approach to addressing the human rights issues implicated by the onward march of the forces of globalization.

13. There is a growing recognition that the two sides in the globalization debate need to speak much more intensely to each other. We are deluged by a monologue (rather than dialogue) between the prime movers of globalization represented by institutions such as the Organization for Economic Cooperation and Development (OECD), the Group of Seven industrialized countries (G7) and the World Economic Forum (WEF) that gather annually at Davos, on the one hand, and the protesters and other critics who stalk their meetings on the other.[22] Between the two extremes, we must respond to the critical issues of the day: is globalization a benevolent force that will eventually produce benefits for all provided countries stick to the basic tenets of increased economic liberalization?[23] What are the real benefits of the numerous bi- and multilateral initiatives, ranging from the Global Compact at the United Nations, to the Africa Growth and Opportunities Act (AGOA) and the movement towards a Free Trade Area of the Americas (FTAA)? Will a renewed focus on poverty and its consequences provide the outlet for a more "compassionate" form of globalization? The answers to such questions may not resolve the fundamental issues that are thrown up by the processes of globalization, but they will assist us to come to grips with some of the very many ways in which we can creatively address the issue, particularly from a perspective that gives primacy of place to the promotion and protection of international human rights.

II. INTERNATIONAL ECONOMIC LAW AND THE REGIME OF INTERNATIONAL HUMAN RIGHTS: TENSIONS AND COMPLEMENTARITIES

14. The major regimes of law implicated in the ongoing processes of globalization mainly concern those related to international trade, investment and finance. Broadly speaking, they fall within the rubric of international economic law, which is primarily concerned with the principles

and institutional mechanisms that undergird developments within the international economy. As such, our examination of the link and tensions between international human rights law and the laws governing international trade, investment and finance can be premised on a number of basic questions: does a liberal regime of international trade, investment and finance - especially that espoused by the dominant proponents of globalization - *always* foster the promotion and protection of human rights? Secondly, is there a necessary synergy and mutuality of support between increased international trade, investment, finance and human rights? Finally, are there situations in which the two regimes may conflict? Against the backdrop of these preliminary inquiries we may then consider how both regimes of law (and particularly the institutional mechanisms designed to give them effect) have sought to achieve a balance of their objectives, and particularly to achieve the goal of sustainable human development. In doing so, we address the general misconception that the two regimes of law exist in pristine, self-contained isolation. Since it is the same entities (States) that have created and adopted the norms and standards of the two bodies of law, what becomes necessary is to ensure that there is greater coherence between the two.

15. Answers to the questions we pose above are not clear-cut, and it is not our intention to engage in an extended discussion of the various conceptual issues that flow from them. Suffice it to state that on the face of it, international economic law has largely not paid much attention to international human rights, and vice versa. Until revival of discussion of the right to development (RTD), human rights law and practice has largely been concerned with the duties and obligations of States. The current system of regulation of the international economy has scant space or time for human rights and other social values. Although the standards exist, there is no uniform ratification, adequate enforcement or integration into the mechanisms or institutions that run the global economy of human rights principles. Indeed, until recently, there has been a marked reluctance on the part of many of the institutions that play a significant role in the global economy, such as the World Bank, the IMF and the WTO, to engage in an extended discussion of the issue. Moreover, when such discussion has taken place it has in the main focused on the external dimension, rather than on the integration of human rights policies into the operations, policies and procedures of governance and accountability of those institutions. In such a context, States - recognized as the principle duty-bearers in the human rights system - face a serious handicap, because the obligations placed on them by such institutions may undermine or usurp their human rights undertakings. Individuals, who are supposedly the ultimate subjects of concern, are even further disadvantaged because of a lack of standing and effective representation in these bodies. This handicap was noted by the Committee on Economic, Social and Cultural Rights (CESCR) in an early statement on globalization, and continues to be relevant at the current time.[24] While it is true that such organizations are essentially made up of States, such a supposition does not address relations of power, resources and inequality that States are confronted with in the context of their operations and policy formulation. It is these concerns that informed the debate behind the promulgation of the Declaration on the Right to Development.

16. On the other hand, the regime of law concerned with the promotion and protection of international human rights is itself not free of problems. Despite assertions about the universal character of human rights, several issues remain outstanding - whether of a conceptual or an enforcement nature. Thus, the insidious categorization of international human rights law continues, despite the Vienna Declaration's proclamation on the indivisibility, interdependence

and interrelationship of human rights, and the considerable work by the CESCR in clarifying this category of rights. Sometimes couched in terms of implementation, resources, or their alleged non-justiciability, the net effect has been to downgrade the importance of economic, social and cultural rights while paying lip-service respect to civil and political ones. Secondly, the enforcement mechanisms of international human rights remain weak and perfunctory, unless there is an overriding interest of a political or economic nature that is driving the action. In the view of Antony Anghie: "... while institutions and actors furthering globalization are single-minded in their task, important international bodies whose function it is to protect human rights and social welfare appear hesitant, more intent on placating than challenging globalization".[25]

17. Against the background of these tensions, the problem remains that some countries have not benefited from the new developments in the global economy. Neither have many individuals in such countries gained from the increased attention to international human rights. Is it surprising that many developing countries can paradoxically argue that the mechanisms introduced within the WTO regime are simply disguised protectionism because they seek to deny developing countries with lower labour and environmental standards the right to compete on a level playing field?[26] The last decade has witnessed numerous countries - especially developing and the least developed countries (LDCs) - adopt all the basic tenets of a liberalized economy, including free exchange rates, reduced regulations on prices and markets for goods (including farm produce), and the dismantling of trade and financial barriers, all in the name of deriving maximum benefits from the processes of globalization.[27] However, in the most recent report of the United Nations Conference on Trade and Development (UNCTAD) on LDCs, the conclusion is not edifying: most of the poorest countries' economies have still fared badly, some even worse than before liberalization, partly on account of dependence on a single cash crop, insufficient donor support, and the intervention of wars and coups.[28] But the problem may stem from the very conceptualization of the policies and programmes of liberalization.

18. Given these issues, it is clear that there is a problem with both regimes of law. In the words of Steve Charnovitz, international trade law needs to "... become more like international human rights law in establishing norms for what a State owes its citizens". For its part, "international human rights law needs to become more like international trade law in enforcing norms through mandatory dispute settlement and potential penalties for non-compliance".[29] It is fairly obvious that resolving the tensions and bringing the two regimes of law closer together will be no small task. In the following sections of the report we hope to contribute to a bridging of the gap with a specific focus on the issue of intellectual property rights (IPRs), dispute settlement at the WTO, and the evolving role of the World Bank and the IMF in the debate about poverty.

A. Globalization and the question of intellectual property rights

19. Few issues have more dramatically illustrated the tensions we are concerned with in this study than the relationship between IPRs and human rights, as well as the implications of the WTO Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS). Intellectual Property has been recognized and protected for many years. Indeed, even the Universal Declaration (in art. 27.2) and the ICESCR (art. 15.1) make broad mention of such rights, although there is much debate over their status in relation to other rights in the

instruments.[30] However, the connection of IPRs to trade is of more recent vintage.[31] One perspective argues that TRIPS was the result of the growth in international trade, the explosion in information technology, concern over the erosion of competitiveness on account of inadequate IPR protections - especially in technology-importing countries - and the use of unilateral mechanisms for the resolution of IPR disputes.[32] Another sees TRIPS within the wider political economy of capitalist development and the quest by developed industrialized countries and transnational corporations to retain their monopoly on the global economic stage.[33] Whatever the case, IPRs in general, and the TRIPS Agreement in particular, have significant implications for the full observation and protection of international human rights.[34] Specifically, questions arise as to whether, in the first instance, TRIPS adequately balances the competing private and human interests involved in the IPR debate. Secondly, concern has been expressed as to whether the Agreement achieved the necessary balance between notions of individual versus group/community rights, and environmental conservation within the context of the sustainable use of biological diversity and the recognition of non-Western forms of knowledge generation, exploitation and protection. In the broadest sense, these issues are linked to discussions on the right to development. More specifically, numerous other human rights, such as those to health, food, culture, adequate living standards and a healthy and sustainable environment, are also implicated in the debate.[35]

20. TRIPS largely consolidates and strengthens previous international agreements on IPRs.[36] In this respect, TRIPS is not substantially new. However, the most important implications for globalization and the full observation of human rights of the Agreement lie in the universalization, harmonization and minimum-standards application of IPR protection and the method of enforceability through WTO dispute settlement mechanisms.[37] In contrast to the rest of the agenda in the Uruguay Round, the negotiations over TRIPS were not about freeing trade. Rather, they were about more protection and tighter control. What does this imply? Given the fact that TNCs are the holders of the largest percentage of IPRs, it is quite clear that the main thrust of the negotiations favoured the enhancement of monopoly corporate power.[38] Concerns expressed about TRIPS promoting the concentration of ownership of IPRs in developed countries and powerful non-State actors are thus quite understandable. This is particularly the case because prevailing definitions of IPR take more account of the interests of the producers (or owners) of knowledge than they do the users. In short, the protection of IPRs under TRIPS presents a paradox for international economic law in that it runs against the basic tenets of liberalization and favours monopoly restriction and control. In respect of international human rights, since a patent holder can utilize the period of monopoly restriction to prevent competition, create dependencies, or to simply make windfall profits at the appropriate moment, such protection can have serious consequences for basic human existence. The danger is that such monopoly control can be given higher priority than ensuring the progressive realization of the rights to health, food, access to information, and even the right to education.[39] Such monopoly control can lead to the development of monocultures and the loss of biodiversity - thereby affecting the right to a livelihood for ordinary farmers and engendering conditions of dependency and unequal control that do nothing to aid the development of underdeveloped societies. In the words of Vandana Shiva: "Corporate strategies and products can lead to diversification of commodities, but they cannot enrich nature's diversity".[40]

21. A number of provisions of the Agreement have been the focus of considerable attention. Among them are articles 27.1 (on the subject-matter of a patent); 27.3 (on plant varieties and biological resources); 33 (on the term of a patent) and 65, 66 and 67 (on transitional periods, the situation of LDCs and technical cooperation). For developing and the least developed countries, the major implication of TRIPS is the undertaking to substantially review, expand and strengthen their IPR legislation, within specified periods.[41] Thus, because the standards adopted in the Agreement are derived, in the main, from developed country contexts and notions,[42] TRIPS considerably increased the burden shouldered by such countries in respect of enforcing IPRs, despite the fact that the agreement contains several provisions, such as articles 6 (non-discriminatory "parallel importation"), 7 (promoting technological innovation and transfer), 8.1 (protection of public health and nutrition as well as public interest), 8.2 (research exceptions/the "Bolar" provision), 30 (exceptions to patents), 31 (other use or "compulsory licensing") and 40 (controlling anti-competitive practices), designed to allow countries to take measures shielding them from the adverse consequences of full IPR protection. But questions have been raised about whether these measures of protection are adequate, and whether the room for manoeuvre does not leave some ambiguity that could have negative repercussions for human rights.[43] Coupled with these concerns is the fact that subtle and overt pressures exerted for conformity may override any attempt at restriction or regulation.[44] Indeed, the hope that TRIPS would end (or outlaw) unilateral pressures on countries to establish high levels of IPR protection has largely proven ill-founded.[45] In other words, TRIPS is as much about legal regimes as it is about political and economic power. While it is quite obvious that the interpretation and implementation of the Agreement is in the hands of the States members of the WTO, differentials in power, influence and resources clearly place a limitation on the room for manoeuvre actually stipulated within the Agreement.[46]

22. One of the most contentious human rights issues in TRIPS is the extension of the protection of patents to both products and processes, specified in article 27.1. Before TRIPS came into force, many developing countries allowed pharmaceutical processes to be patented, but not the final product. Others simply excluded medicines from the ambit of patents law. This made it possible to produce generic versions of patented drugs locally. In this way, not only could the cost of drugs be brought down, but the development of local capacity in technological innovation was also enhanced. Because of the TRIPS stipulation that patent protection should cover both imported products as well as those manufactured locally, some observers have argued that there is no need to work the patent on a product within the country granting the right. According to this argument, the company that controls the patent can supply global markets under the patent monopoly, exporting the finished product instead of transferring technology or making foreign direct investments (FDIs) in that country - a position that can have serious implications for the development of local technology, and several other areas of human livelihood. It also raises the issue of access to new, expensive technologies which may substantially improve the living conditions of the people. This issue was at the heart of the recently withdrawn WTO dispute between the United States and Brazil. There, Brazil sought to impose a requirement in its national legislation that a product had to be produced locally (the so-called "local working" clause) as a precondition to granting a patent in Brazil. The issue remains a gray area because the suspension of the proceedings has meant that there is no authoritative interpretation of the provision.[47] Needless to say, the fact that the United States could seek recourse to the WTO for the enforcement of a measure that could have serious

consequences for the progressive realization of human rights illustrates that, at a minimum, the protections in TRIPS are not watertight. Moreover, the settlement does not represent a shift in the United States position on the issue.

23. The specific debate about IPRs and health needs to be connected to the several challenges globalization in general presents to the realization of the right to health. The World Health Organization (WHO) notes that it is important to guard against the potentially grave consequences that could occur in a health market that is not appropriately managed, or, we may add, a market in which the motive of profit is paramount.[48] In a context where health policy in many developing countries has been increasingly forced to respond to the demands of globalization, the consequences are several, including the increased cost of hospital and other forms of health care, ambulatory services, and the privatization of the care of aged persons. Furthermore, the payment of user fees for health care as well as medicine is related to the imposition of structural adjustment programmes (SAPs) in which government spending has been slashed or wholly eliminated.[49]

24. All of these measures of economic reform have substantially (and mostly negatively) impacted on the progressive realization of the enjoyment of the highest attainable standards of health as a fundamental human right, as stipulated in article 25.1 of the Universal Declaration and article 12 of the ICESCR. The latter in particular stipulates that among the steps to be taken by States parties to achieve the full realization of this right shall include those necessary for the "prevention, treatment and control of epidemic, endemic, occupational and other diseases" and the "creation of conditions which would assure to all medical service and medical attention in the event of sickness". Against such a background, IPRs have a particular relevance especially in developing and underdeveloped contexts. Increasing the standards of IPR protection may not necessarily improve the observance of human rights, especially if one considers the fact that only 1 per cent of the new chemical entities marketed between 1975 and 1997 related to tropical diseases.[50] A strict regime of patent protection could mean that effective medicines are patent protected and thereby rendered prohibitively expensive. Finally, if the primary objective of protection becomes playing to the interests of those who control the market (rather than broader social goals), then the incentives for pharmaceutical companies to develop new drugs targeting so-called "unprofitable diseases" will be even more reduced.

25. The situation is compounded outside the arena of TRIPS because pressure is being exerted on countries to confer IPR protections that are more extensive than those stipulated in the Agreement. This is within the framework of so-called "TRIPS-plus" contexts. Described by WHO as attempts to enact national legislation that extends the life of a patent beyond the TRIPS minimum of 20 years, limiting compulsory licensing in manners not necessarily mandated under TRIPS and imposing exceptions that may facilitate the prompt introduction of generics, such measures may result in an intensification of the overall struggle to promote and protect human rights.[51] The application of extensive IPRs to emerging sectors of the global economy, such as e-commerce, is another such measure. The additional problem with these types of pressures is that they are mostly exerted in bilateral contexts where the room for flexibility is even more limited. Such concerns have been raised, for example, within the context of AGOA where, lured by the possibility of market access to the United States economy, African States may be forced to make concessions on the recognition and protection of IPRs that are higher than those stipulated in TRIPS.

26. Given the challenges presented above, numerous countries have designed legislation that may be considered more restrictive than the TRIPS Agreement permits. Many developing countries and LDCs are using mechanisms such as compulsory licensing and parallel (or "gray") market importation - the former involving a grant of a compulsory license before a patent expires, while the latter involves the importation of products from one country to another without the approval of the patent holder. Although not prohibited under the TRIPS Agreement, such measures have nevertheless resulted in contention between developing country Governments and multinational pharmaceutical companies.[52] Most contention has focused on the new lifesaving drugs intended for the treatment of HIV/AIDS. The most prominent of these pharma-battles have involved Kenya,[53] India,[54] Brazil, Ghana and South Africa, but they are not the only ones. In South Africa, the contention arose over the Medicine and Related Substances Control (Amendment) Act.[55] From the perspective of the pharmaceutical companies, the most controversial provision was new section 15C, entitled "Measures to ensure supply of more affordable medicines". The pharmaceutical companies were of the view that the provision sought to give the Minister for Health powers to override patent and trademark rights at any time by mere administrative action.[56] Thirty-nine companies banded together to take the South African Government to court to stop enactment of the law. The proposed action drew worldwide attention, galvanizing civil society into action and leading to the eventual withdrawal of the suit.[57]

27. The withdrawal of the case represented a significant success on the part of those seeking greater accessibility to drugs, particularly drugs for the treatment of HIV/AIDS which, until recently, were prohibitively priced. In short, it represents a victory for the progressive realization of the right to health. However, these recent developments may be only a pyrrhic victory. Many observers have pointed to the fact that the withdrawal represents only a temporary respite: according to Samanta Sen, "the decision to withdraw was a tactical move, rather than a sudden and joint discovery of social responsibilities. There were indications enough from the court already that the verdict would go against the drug companies."[58] While a number of European Union countries voiced their support for the South African legislation, the United States and the United Kingdom were notably silent.[59] The United States even gave tacit support to the companies - illustrating in bold relief the nexus between corporate and State interests in the arena of international trade. That support is not likely to taper off, given the overall influence of corporate actors on these Governments, and the fact that prior to the case, the United States government attempted to exert bilateral pressure on the South African Government until the issue threatened to become a public relations disaster.[60] The same issue was at stake with respect to the action by the United States against Brazil, which itself was preceded by similar action against India.[61] In the case of Brazil in January this year, the United States initiated a formal complaint at the WTO against Brazil's Industrial Property Law of 1996,[62] arguing, inter alia, that the law discriminated against imported products and that that violated TRIPS.[63] Pending hearing of the dispute, pressure was stepped up in bilateral forums (as was the case with both India and South Africa), with Brazil being placed on the Special 301 "watch list" that permits unilateral trade sanctions.[64] Even as the United States announced a halt to the WTO action it reserved the right to revisit the matter, even in bilateral forums. In the wake of these developments and severe criticism from all quarters, the pharmaceutical companies have gone on a public relations offensive - announcing several initiatives in HIV/AIDS prevention, research and treatment, and even offering their previously highly priced drugs at prices that match the generics, especially in several African countries.[65]

28. To its credit, the WTO has also been grappling with the implications of TRIPS for the accessibility and affordability of essential life-saving drugs to combat diseases such as tuberculosis, malaria and HIV/AIDS, within the overall context of the review of the Agreement that is under way. For example, the TRIPS Council conducted a special debate on the impacts of IPRs and pharmaceutical patents on the access by poor countries to low-cost medications.[66] In a recent statement, WTO Director-General Mike Moore - joining voice with economists like Prof. Jeffrey Sachs - popularized the idea of differential pricing, whereby pharmaceutical companies would charge less for drugs in poor countries than in rich ones. Arguing that without a patent system to reward companies for "risking millions on research" anti-AIDS drugs would not exist, Mr. Moore states that new ways of improving access to such drugs for developing countries must be found.[67] A recent joint seminar by WTO and WHO focused exclusively on the subject of the differential pricing and financing of essential drugs.[68] Some suggestions that have emerged from these consultations include establishing differential price levels for rich countries (with strict patent protection continuing) and poor countries; separation of the markets of the two in order to protect incentives for innovation, and the creation of a "Global Health Fund". WTO has also established important linkages with UNAIDS on a range of WTO agreements.[69]

29. According to the WTO Secretariat, informing these discussions is the search for a "balance" between the broader social and humanitarian goals of saving life (enshrined in article 7 of TRIPS) and the need to ensure that pharmaceutical companies are not discouraged from invention and innovation.[70] Although the need for balance is quite apparent, one cannot help but notice that there is a degree to which the issue of cost recovery and the protection of innovation and invention are given much greater prominence than is otherwise warranted; the scale appears tilted to one side. The profit motive (or indeed even the simple quest for recovery on investment) has never been the sole factor behind the drive for new inventions - whether in the field of pharmaceuticals or in any other area of technological invention. The near-exclusive focus on seeking a price reduction or market differentials in the cost of anti-retrovirals does nothing to address two major issues that relate to human rights. The first is the fact that even the reduced cost of the drugs may still be prohibitive to most HIV/AIDS sufferers, who are invariably poor and marginalized. This implies that the problem of access and (to borrow the phraseology of article 12 of the ICESCR) the attainment of " ... the highest standard of health ..." has yet to be adequately addressed. Secondly, it continues the unequal reliance of developing countries on TNCs, without the accompanying transfer of technology and socio-economic and technological development mandated in articles 7 and 8 of TRIPS, and several articles of the ICESCR and the Declaration on the Right to Development. Such dependence further impedes efforts to find local or indigenous alternatives that may be less caustic, or without the negative side effects that are well known to accompany many of the anti-AIDS drugs currently available on the market. Taken as a package deal, the implications for the right to health are fairly clear.

30. There are additional human rights dimensions to the incentives/price differentials debate. First of all, a good number of the tests and clinical trials for life-saving drugs are carried out on people who come from developing countries and LDCs, or from among the less-privileged in developed countries. Such input in the R & D process is seldom recognized. Ironically, it is the very same sort of people who offered themselves for the testing trials who are then eliminated from benefiting from the final drug on account of prohibitive costs and an iniquitous patents system. Secondly, the emphasis on R & D investment conveniently omits mention of the fact

that some of the financing for this research comes from public sources; how then can it be justifiably argued that the benefits that derive from such investment should accrue primarily to private interests? Lastly, the focus on differential pricing between (rich and poor) countries omits consideration of the fact that there are many people *within* developed countries who are also unable to afford the same drugs. This may be on account of an inaccessible or inhospitable health care system (in terms of cost or an absence of adequate social welfare mechanisms), or because of racial, gender, sexual orientation or other forms of discrimination. Because the debate has been skewed mainly towards guaranteeing the protection of innovation and invention, it has yet to approach the issue in a holistic and human rights-sensitive manner.

31. Given all the above, it is the considered opinion of the Special Rapporteurs that the argument for stringent patent protection as *essential* to the promotion of innovation and invention is one that over-privileges the owners of capital. As we have already pointed out, these invariably happen to be multinationals. Other incentives can be put in place to encourage the development of effective drugs for illnesses like HIV/AIDS that could be considered to negatively impact on global human security. To borrow the words of the European Union (EU) at the recent TRIPS Council special discussion on access to medicines, what is required is "... a mix of complementary social, economic and health policies and practices".[71] Furthermore, there is the wider issue of social responsibility, which has earlier been invoked in relation to diseases like polio and which is currently driving many of the private- and public-sector responses to diseases like HIV/AIDS. The fact that many of the pharmaceutical companies that were extremely resistant to reducing their prices are now scrambling to match (and undersell) the prices of competing generics is a telling demonstration of the fact that the argument about R & D costs might not be as weighty as previously asserted. For these reasons, the discussion of price and market differentials - as pointed out by the African Group at the TRIPS Council meeting - should be considered only as "part of a broader set of initiatives to improve access to medicines".[72] Such broader initiatives must include human rights indices in their formulation.

32. The issue of patents on life forms, plant varieties and technology based on indigenous people's knowledge without prior informed consent[73] are among the most contentious issues in the contemporary debate about IPRs and the protection of human rights. A number of commentators have argued that article 1 of TRIPS is sufficiently wide to encompass the protection of traditional knowledge on the grounds that omission of any mention in the Agreement should not be considered as a bar to the enactment of protective legislation. Others have taken a contrary view, and urge that a more explicit stipulation would be required for the recognition of such rights.[74] The fact is that this issue has not been prioritized within the framework of discussions about IPRs. At a minimum, the traditional IPR regime has some difficulty in recognizing the concept of group or collective rights which does not fit into the individualistic and private property-based approach to IPRs.[75] Further concern has been expressed over the growing process of monopolization that is taking place in the seed and biotechnology industries, accompanied by the increased use of pesticides and other methods of capital-intensive agriculture.[76] The processes of "gene pirating" also have serious implications for farmers in countries where technological and industrial resources are simply inadequate to prohibit such piracy.[77] Peasant farmers around the world are under increasing threat of simply being obliterated by the practices of corporate monopolies. The main fears expressed over these practices relate to exploitation and misuse of the enormous commercial and political clout that such entities are able to bring to bear on countries that do not possess similar resources.

33. It is quite clear that most of these problems predate the enactment of TRIPS: biopiracy - the exploitation and private appropriation of traditional forms of knowledge - is a practice that dates back centuries. Nevertheless, within the context of globalization and the various substantive and processual frameworks created by TRIPS, these issues have gained in magnitude. It is for these reasons, among others, that a great deal of attention has come to focus on article 27.3 (b) of the TRIPS Agreement, which is basically concerned with the exclusion from patentability of plants and animals and the protection of plant varieties, either by patents, or through a sui generis system. A host of questions relating to biodiversity, the rights of farmers and farming communities, public health and the recognition of the processes of knowledge generation among traditional communities are implicated in the debate on these issues.[78] With respect to the introduction of either a system of patents for plant varieties or the design of a sui generis system, a major challenge faces countries (especially developing countries and LDCs) at two levels. The first is one of conception, wherein issues of food security, sustainable agricultural management and the development of environmentally sustainable crops are duly taken into account, and the matter is not reduced to the protection of the rights of commercial breeders.[79] The second challenge relates to the political pressures being brought to bear on such countries to adopt regimes of protection that do not substantially differ from that of patents. Thus, many such countries are being urged to adopt the regime created under the International Convention for the Protection of New Varieties of Plants (UPOV) which favours plant breeders' rights.[80] Such pressures could lead to the creation of monopoly rights in an area that will be of substantive importance to human well-being. Comparing IPRs to land rights, Prof. Cullet has stated: "The introduction of intellectual property rights in the management of biodiversity will have exactly the same drawbacks if the allocation of property rights is not undertaken specifically with a view to fostering the realization of everyone's basic food needs".[81] It is thus incumbent on such countries, as well as upon the TRIPS Council in its continuing review of the provisions of article 27.3 (b), consistently to retain a human rights-sensitive approach to this issue.

34. Discussions on this issue are taking place in numerous forums. For example, the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources proposed by the Organization of African Unity (OAU) seeks to strike a balance between protecting local communities, farmers and breeders and the regulation of access to biological resources, in line with the Convention on Biological Diversity (CBD). The issue of protecting plant varieties and the numerous ethical, political and human rights questions related to it has attracted nearly as much attention and controversy as the contention over pharmaceuticals. There is no doubt that from a rights perspective, it is of equal importance and vitality to the overall discussion of the link between IPRs and human rights. In this respect, it will certainly be a major discussion-point at the fourth WTO Ministerial Conference, scheduled to be held in November this year in Doha, Qatar. It is thus incumbent upon the international community to actively monitor and contribute to the discussions on this issue in order to ensure that the human rights perspective is kept in sight. In continuing our examination of the tensions and complementarities within the contending legal frameworks of globalization, we now turn our attention to the mechanisms of dispute resolution in place at the WTO.

B. Dispute resolution at the WTO

35. In recent years, the dispute settlement system of WTO has received considerable attention, in both developed and developing countries. Some concerns have been expressed in the United States, for example, that the rulings of a mandatory dispute settlement system would encroach on State sovereignty.[82] For developing countries, on the other hand, the main issues relate to the accessibility of the system, its impartiality, independence and, indeed, whether in practice the system is sensitive to the fact that the WTO regime is being played out in an uneven playing field.[83] The Uruguay Round introduced an elaborate dispute settlement system that contrasts with the much looser and informal mechanism under the older General Agreement on Tariffs and Trade (GATT) regime (1947). The Dispute Settlement Understanding (DSU) of WTO[84] provides in detail for a system that mandatorily binds all members of the organization. The scheme spelt out in the DSU is considered by the WTO as pivotal to the working of its rules-based trade regime, assisting in the maintenance of the "international rule of trade law". As article 3.2 of the DSU declares, "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system".

36. Indeed, certainty regarding the rules of dispute settlement has the potential to enhance confidence in a given regime of law. However, it has to be borne in mind that any institutional mechanism, especially one that is judicial in nature and seeks to promote the rule of law, must necessarily possess the attributes of providing equal access to justice and of impartiality and independence. Furthermore, it is imperative that there is confidence on the part of stakeholders that provision is made for effective remedies and their enforcement. Rather than engage in an analysis of substantive issues thrown up by the various reports of dispute settlement panels (DSPs) and the Appellate Body (AB) adopted by the Dispute Settlement Body (DSB), this section of the report seeks to assess the dispute settlement mechanism more from a systemic point of view. In other words, we are here concerned with the processual rather than the substantive elements in the mechanism because these have more direct implications for the promotion and protection of human rights. On the one hand, it raises issues of access to effective remedies and due process rights of member States, especially of developing countries. On the other, there is a deep concern that systemic issues such as the unrepresentative nature of DSPs and the appointment of government officials as panellists would give rise to a system biased towards a particular ideological position. That would, among other things, inflict injustice on the existing possibilities of balancing the rigours of free trade with human rights and environmental concerns, for example, under article XX of the GATT or the exceptions to the TRIPS regime. Indeed, it is only logical that expectations with regard to the Dispute Settlement Mechanism should be held by those who recognize the crucial necessity of establishing this balance to the maximum extent possible within the existing WTO system. The Special Rapporteurs are of the considered view that in order to achieve this goal the problematic nature of the systemic issues identified below need to be recognized and addressed in a constructive manner.

37. The DSU introduces a multi-tiered system. In a welcome move, the system combines non-adversarial methods with formal adjudication. Parties to a dispute are first encouraged to attempt to resolve the dispute through consultation or through "good offices", mediation and conciliation. In the event of failure to find a solution through those methods, the complainant can request the establishment of a panel that uses adjudicatory methods to examine the submissions of the parties. However, proceedings of panels are not to be held in public, which,

according to the WTO, stems from a long tradition of both inter-State and commercial arbitration. In sharp contrast to the previous (GATT 1947) regime, a right of appeal is provided for under the current scheme. Any party to a dispute can appeal against the report of a panel to the standing Appellate Body established under the terms of the DSU. The entire system is overseen by the Dispute Settlement Body - the General Council functioning in that capacity when necessary - established under the DSU.[85] As an alternative to all those methods, under the DSU, disputing parties may opt for arbitration. If there is a finding that an impugned domestic measure adopted by a member State is inconsistent with an agreement covered under the GATT/WTO system, either a panel or the AB shall recommend that the erring party bring the measure into conformity with the agreement.

38. In other words, the only form of redress that the system permits is to require a respondent member State to bring its policies into line with its obligations as interpreted by either a panel or the AB. The payment of compensation comes into play only in the event of non-compliance, as a temporary measure. Failing that, the aggrieved party can suspend the application to the erring party of concessions or other obligations under the covered agreements, with the authorization of the DSB. The DSU prescribes strict time limits for the completion of the various stages of the process. Assuming that the prescribed timetable is adhered to, a dispute could still take up to two and a half years to go through the entire system including the appeals process. A unique feature of the new regime is the adoption by the DSB of either panel or AB reports by "reverse consensus", which means that the report will be deemed adopted unless there is a consensus not to adopt it. This rule prevents the possibility of one party (usually the party against whom there is an adverse finding) or a few from vetoing the adoption of the report, as was the case under the old system.

39. If the measure of confidence in the system is to be gauged merely by how frequently it has been resorted to by member States, the new system established by the DSU has fared very well. As at 23 March 2001, the DSB had received 228 complaints since 1 January 1995.[86] However, when one disaggregates the users of the system according to the state of economic development of the members, it is very clear that developed countries are in a majority. As at 23 March 2001, of the requests on which panels were established, 150 were from developed countries compared with only 59 from developing ones.[87] Of the developed countries, the United States was the most frequent complainant, while Canada and the European Communities as a trading bloc were also prolific. The respondents in those cases were mostly other developed countries. However, in at least 50 cases the respondents were developing countries. Of the cases brought by developing countries, nearly one half were against other developing countries. It is noteworthy that not a single one of the least developed countries - the most vulnerable to violations against them - was a complainant.[88] It has also been perceptively pointed out that developed countries coordinate their complaints against developing countries more actively. For example, in the matter relating to India's quantitative restrictions of imports, six developed countries brought complaints before the DSB. Four developed countries brought complaints relating to Indonesia's automobile industry. The same pattern has not been observed for the most part where developing countries are concerned.[89] These statistics graphically reveal the reality that it is the developed countries that are the main stakeholders and protagonists in the trade arena. The same countries are also in a position - both where resources and expertise are concerned - to readily use the DSU system to protect their interests. A handful of developing countries such as India, Argentina and Brazil are valiantly attempting to "belong" to the system.

However, as long as this divide with regard to access to the DSU system persists, the objective of injecting stability into the international trading system by providing a redress mechanism will remain illusory.

40. Aside from resource constraints and a lack of technical know-how on the part of developing countries, there are a number of systemic flaws created by the DSU itself that do not augur well for creating confidence in the system. In fact, unless addressed by the WTO in a meaningful way, the systemic flaws that will be discussed below will always leave space for suspicion and the perception that the dispute resolution system is tilted in favour of a specified group of countries. Article 8.1 of the DSU permits not only non-governmental experts but even governmental experts to serve on panels. Senior trade policy officials of members are specifically mentioned. Those who have served as representatives to the council or committee of any covered agreement, or even the WTO secretariat, are also deemed eligible for appointment if they are "well qualified". What is meant by "well qualified" is not spelt out. Article 8.2 goes on to declare that members should be selected to panels "with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience". DSB panels are adjudicatory bodies. Once their reports are adopted by the DSB their findings are binding on the parties. Given the judicial nature of the functions of the panels, the appointment of governmental personnel to such a body is indeed a flagrant violation of the fundamental principles of natural justice. This factor makes it nearly impossible to achieve the objective of ensuring the independence of the panellists as articulated in article 8.2. The exhortation in article 8.9 that panellists shall serve in their individual capacities and not as government representatives nor as representatives of an organization rings rather hollow.

41. Whether at a national or international level, there is an expectation that justice must not only be done, but must also be seen to be done. Even if government officials make a bona fide effort at being independent and impartial, the perception of governmental influence, and the possibility of its actual occurrence, is palpable. The current tendency to appoint government officials, including diplomatic representatives of members serving in Geneva, as panellists is a serious flaw that gravely erodes the credibility of the DSB. Even if, for argument's sake, one accepts the appointment of government officials as adjudicators, another troubling dimension emerges. To a large extent, government officials who serve on panels tend to be from developed countries. The primary reason, once again, is a question of resources. As veteran WTO observers Hoekman and Mavroidis have pointed out, appointed officials continue to be paid by their Governments.[90] Developing countries cannot afford to do the same. Furthermore, it is developed countries that have an abundance of diplomats in Geneva with the relevant expertise whose names eventually find their way onto the list of panellists compiled under article 8.4. Many developing countries have limited representation in Geneva and thus also expertise.[91] This reality makes it difficult to achieve the objective of having on a panel members with "a sufficiently diverse background" within the terms of article 8.2. While it is true that members have a degree of flexibility in choosing panellists, the fact that the available pool is restricted in terms of its representative nature makes the choice quite limited. Hence the call of the two authors to professionalize the panels by having a permanent roster of experts, with the WTO underwriting the costs.[92] Ideally, all those on the roster must be independent experts. Such reforms would ensure consistency in the DSU scheme. It must be noted that under the DSU, the seven-member AB is required to consist of "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally.

They shall be unaffiliated with any government" (art. 17.3). The fact that the seven-member AB has seen the appointment of persons of integrity and eminence is commendable. However, that fact provides little comfort to resource-strapped countries that may find recourse to the AB too costly a proposition. Reforms regarding DSB panels are of the essence.

42. The problematic issue of who serves on panels is compounded by the fact that the panel meetings shall, as a rule, be closed[93] (except when the panel invites the parties to the dispute) and the opinions expressed in the panel report by individual panellists will be anonymous.[94] The level of accountability of panel members, given the lack of transparency of the proceedings, is indeed minimal. The sole remedy that could be prescribed by a panel or the AB is to recommend to the member concerned that its internal measure which was found offensive should be brought into line with the relevant covered agreement (art. 19). Compensation and the suspension of concessions under the relevant agreement are considered to be temporary retaliatory measures when the member defaults on compliance with a recommendation to change its internal measures. Given the asymmetry in bargaining power between developed and developing countries, it is quite doubtful that retaliation through suspension of concessions by a complainant developing country will have a sufficiently negative impact on the economy of an offending developed country for it to be compelled to comply with a ruling. Given this dynamic, the obligation to comply vis-à-vis a developing country becomes purely moral. This factor can act as a disincentive for developing countries to use the dispute resolution mechanism and further exacerbate an already inequitable situation. Therefore, the need for more effective remedies (such as payment of compensation coupled with specific recommendations for compliance) and stronger enforcement measures is acutely felt.[95] The case concerning restrictions on banana imports to the EC, in which the United States was a complainant, and the failure on the part of the EC to comply promptly with the recommendations heightened fears that if two trading giants could be locked in such a situation the predicament of developing countries could be a sorry one indeed. On the other hand, retaliation by the United States against the EC without obtaining prior approval of the DSB was also extremely problematic.[96]

43. As pointed out above, a major obstacle to the DSU system becoming a stabilizing force is the asymmetry in resources and technical know-how between developed and developing countries, making access difficult for the latter. On the other hand, given the prolific use of the system by developed countries, developing countries are vulnerable to the possibility of becoming respondents in a number of cases, sometimes over the same issue, as in the quantitative restriction of imports case involving India. In this connection, it is also important to highlight the provision in the DSU that puts a heavy onus on a respondent. Article 3.8 stipulates that where there is an infringement of the obligations under a covered agreement, there is a presumption that a breach of the rules has an adverse impact on other members parties to that covered agreement. It is then up to the member against whom the complaint has been brought to rebut the presumption.

44. Commentators have referred to the high cost of services of specialized international law firms on legal issues as complex as those arising under the WTO/GATT regime, thereby placing an impossible burden on most poor countries.[97] Article 27.2 of the DSU takes limited note of the need of developing countries for technical assistance by making provision for the WTO secretariat to assign an expert from its technical cooperation services to a developing country which is a party to a dispute, if the country so requests. But the inadequacy of such assistance

has been pointed to by those familiar with the inner workings of the WTO who observe that providing such services is at odds with the requirement of neutrality of the WTO staff; moreover, such assistance is made available only after a dispute has arisen.[98] If using the DSB is to be a viable proposition for developing country members, a neutral scheme providing "legal aid" and technical know-how has to be made available. An Advisory Centre on WTO Law (ACWL) has been mooted and was accepted at the Seattle Ministerial Conference.[99] The success of such an initiative of course depends on the commitment to provide financial resources to such an entity. For obvious reasons, developing countries will not be able to rely on bilateral assistance to finance their legal battles at the WTO. It is thus crucial that while pressing for a strengthened review mechanism on dispute resolution, and indeed other areas of the current WTO regime, developing countries must harness their available resources, expertise and ingenuity to collectively find ways of using the DSB to "level the playing field" to the maximum possible extent. Such initiatives at a regional level may also prove to be effective, enabling regional groupings with similar experiences to pool resources and ensure the development of cohesive strategies to deal with the challenges they face. These centres must not only assist members with representation at the DSB, but also provide expertise before a dispute arises to enable them to gather information, analyse policy and the practices of others so as to be able to assess a situation and respond accordingly.

45. There are several provisions in the DSU that require special consideration of conditions prevailing in developing countries.[100] These provisions relate, inter alia, to extension of time in panel procedure, special consideration in the surveillance of implementation of recommendations and rulings of the DSB, and consideration of special situations in LDCs. What these provisions will amount to in concrete terms is still not very clear, as interpretations by panels and the AB have yet to evolve. However, it has to be pointed out that constructive interpretation of these provisions is tied up with the representative and independent nature of panels and the AB that was the subject of discussion above. Commentators from developing countries have pointed to troubling interpretations of the GATT 1994 and covered agreements that appear to add to the obligations of members. They argue that this contravenes the stipulation in article 3.2 of the DSU that recommendations and rulings of the DSB cannot add to or diminish the rights and obligations of members provided in the covered agreements.[101] Furthermore, it has been pointed out that some of the rulings are at odds with each other, giving rise to a sense of great unease that panels are treating similar issues differently depending on the party concerned.[102] For example, in the s.301 case against the United States brought by the EC,[103] where provisions of the United States Trade Act of 1974 (as amended) were challenged on the basis that they permitted unilateral sanctions by the United States in contravention of the DSU, the WTO Agreement and GATT 1994, the panel found that the impugned provisions were not in violation, accepting an administrative undertaking by the United States that the provisions would not be administered in a contrary manner. The merits or demerits of the law itself were not the main focus of the finding. However, in the case brought by the United States against India relating to the latter's obligations under the TRIPS Agreement,[104] both the panel and the AB found an undertaking by the Government of India to administer transitional provisions through administrative orders to be unacceptable in the absence of a clear-cut provision of law that established a mechanism to receive patent applications. These lingering concerns and suspicions about the DSU system could be analysed from a purely technical point of view. But it is also clear that the concerns articulated are intimately linked to the dissatisfaction felt over some of the systemic problems such as the composition of the panels and the lack of transparency in proceedings, compounded

by the limitations brought on by the resource constraints and institutional weaknesses of developing countries. Provided such serious concerns over the DSB remain, its ability to function as a credible dispute resolution mechanism that infuses stability into the system will be adversely affected. If the systemic deficiencies discussed above are addressed constructively, the credibility of the system will be greatly enhanced, and the space for seeking the necessary balance heightened.

46. Lack of transparency in DSU proceedings and difficulties in accessing relevant information affect not only members but also the ability of civil society to scrutinize the workings of a legal regime that has such a profound impact on humankind. It is no secret that civil society interventions, in Seattle and beyond, have had a major impact on the WTO, resulting in regular briefings, an interactive NGO "chat room" and a special electronic NGO Bulletin Board.[105] The crucial need for civil society participation in the WTO process is a factor that the organization cannot simply wish away. It has to find ways and means of working with civil society groups in a more constructive manner. The Special Rapporteurs note that a welcome dialogue has commenced regarding external transparency within the General Council of the WTO, and the Internet WTO Web page has made some information readily available. These are positive beginnings. Similarly, it must be reiterated once again that the DSU system has much to gain by opening up the dispute resolution proceedings even more to the public.

47. Direct NGO participation in the dispute settlement system has run into difficulties.[106] Only the United States supports an earlier ruling of the AB (in the Canada-EC dispute over a ban on asbestos products[107]) that NGOs may submit amicus curiae briefs. Many members seem to distinguish this issue from those relating to external transparency. The thinking of developing country members is that this would open the floodgates to well-endowed NGOs in the North creating yet another divide. It also has been pointed out that the right of panels "to seek information and technical advice" as permitted under article 13 of the DSU cannot be stretched this far and that as a substantive issue the final say must be had by the General Council.[108] In the light of current NGO networking on the global neoliberal economic agenda, the argument that North-based NGOs will monopolize civil society activities in the DSB and push an agenda inimical to developing country interests may not hold much water.

48. What appears more plausible is like-minded NGOs from the North and South collaborating to push for a balanced interpretation of the rules-based system, tempering the harshness of a purely market-oriented approach. Given the reality, however, that the General Council has come down strongly on the matter, it will be more pragmatic for NGOs to prioritize issues on WTO external transparency and press for avenues for making interventions in the most effective manner. From the preceding analysis, it is amply clear that if the DSU system is to serve the purpose of meting out justice within the existing international trade regime, it will have to win the confidence of a wide spectrum of members as a professional, impartial and accessible system. We wish to underscore the fact that it is only through such a system that all parties can seek a balanced application of the trade regime which takes into consideration not only the logic of the market, but also available safeguards regarding human rights and environmental standards. For that to happen, there will have to be serious stocktaking of its performance over the past six-plus years, and a serious and sustained review and reform agenda undertaken. Priority must be given to ensuring the independence, impartiality and representative nature of panels and of the AB, accessibility by developing countries, stronger remedies, and internal and external

transparency of the dispute settlement procedures. We return to the general issue of accountability after a review of the operations of the World Bank and the IMF with respect to poverty eradication.

C. Multilateral institutions and the phenomenon of poverty

49. In the wake of the demise of the Washington Consensus - the package of shock-therapy policy reform measures that were in place throughout most of the 1980s and 1990s - there appears to be a new wind blowing at the premier MLIs, the World Bank and the IMF. Featuring as a priority focus in these changes is the issue of poverty reduction. The reduction of extreme poverty by one half heads the list of global targets to be reached by 2015 or earlier, set by the Development Assistance Committee (DAC) of the OECD. In a recent speech, the Deputy Managing Director of the IMF, Stanley Fischer, both recognized the necessity to "... invest in the human capital of the poor ..." and apologized for the Fund "... having perhaps paid too little attention to this need ...".[109] James Wolfensohn's six-year tenure as President of the World Bank has been marked by continuous expressions of concern for the situation of escalating global poverty and growing inequality, and he is largely credited with moving the Bank away from the strict regime embodied in the Washington Consensus.[110] In late February, in what was described as an "... unprecedented joint visit" by the heads of the Bank and the Fund to the African continent, issues concerning investment, the effects of globalization, and the battle against poverty and HIV/AIDS were on the table for discussion.[111] The question that must be asked is whether these developments represent a wind of change, or simply a change in the wind? In particular, are the debt reduction initiatives taken by the two institutions sensitive to basic concerns for the promotion and protection of human rights?

50. The debt reduction initiatives of the MLIs date back to 1996, with the introduction of the Heavily Indebted Poor Countries (HIPC) Initiative.[112] In a departure from efforts that had focused only on the rescheduling of official debt (the Paris Club) and Commercial Creditors (London), HIPC was the first concerted international effort to include multilateral institutions in the quest for a comprehensive debt-relief programme for developing countries.[113] The Bank considers the initiative to be one of its most important policy interventions, because it "... represents an opportunity to correct an alarming trend of collapsing policy selectivity in countries with high multilateral debt".[114] As of 2001, debt-reduction packages under HIPC have been approved for 23 countries, 19 of which are in Africa.[115] The result has been the lifting of over $34 billion in debt, equivalent to half the burden they shoulder.[116] Chad became the latest country to qualify for a debt-reduction package with US$ 260 million in relief granted in May this year.[117] Viewed in quantitative terms, the results are fairly impressive. In qualitative terms there is still a problem, given that since 1996 the Initiative has covered only a little over half of the 41 countries which fall into the category of highly indebted.[118] We thus need to look further: to what extent do these initiatives take human rights issues into account, and what are their implications for the goal of sustainable human development?

51. It is essential to examine the wider political economy in which these poverty eradication strategies are being devised, and to scrutinize the social policies accompanying that agenda. In short, we must unravel the New Poverty Agenda (NPA) of the MLIs. Certain basic tenets inform the NPA, including a focus on good governance, functioning legal and judicial systems, education and health care initiatives, the fight against corruption, and of course the issue of debt

reduction.[119] In the contemporary context of intensifying marginalization taking place around the world, there can be little doubt of the importance of these issues. Their identification as such by the MLIs is thus of significance to the overall struggle to ensure that global conditions of equity are fostered. But does the mode in which these issues are being approached go far enough? It is quite easy to discuss such issues in pristine isolation from their connection to human rights. However, as pointed out by Alf Jerve, for such approaches to be genuinely rights-sensitive, poverty must be seen to include "... the more immaterial aspects of life, such as lack of personal security, access to information, and the ability to influence political decisions".[120] A rights-based perspective would thus address both the improvement in livelihood plus "... access to resources, expansion of knowledge and increased empowerment".[121] Unfortunately, the NPA has nothing to say about the dimension of the struggle that relates to the functioning and policies of the MLIs, limiting itself to the States at which the strategy is directed. Consequently, issues such as greater transparency in the formulation of policies, the governance structures under which they operate, and the all-important issue of the accountability of MLIs for the policies they design are not given any attention. Once again, the limitations inherent in such an approach are evident; without a concerted effort at internal reform and reorientation, focusing on governance issues alone - particularly in an instrumentalist manner - addresses only one part of the problem.

52. As a central platform of the NPA, the initial HIPC strategy was criticized as too slow and inadequate on account of the complexity of the process, i.e. a country must have undergone at least two Enhanced Structural Adjustment Facilities (ESAFs) under IMF supervision, which amounted to six years. There was also an inappropriate definition of debt sustainability levels, high threshold levels (with the ratio of debt service to fiscal revenues at 25 per cent), and finally, there were inadequate funds to support it. The initiative was modified in 1999 in recognition of the deficiencies of the first strategy, and in a bid to grant relief to more countries. At Cologne, in June of the same year, the G7 promised "faster, broader and deeper debt relief" and brought the issue of poverty reduction to the centre of the HIPC reform debate.[122] In what was heralded as a marked departure from previous policy, in September of the same year, the IMF replaced the ESAF with the PRGF.[123] The core of the new programme was its ostensibly "growth-oriented strategy" elaborated by borrowing countries in Poverty Reduction Strategy Papers (PRSPs) that were to "... emerge directly from the country's own poverty reduction strategy".[124] The issues of national ownership and civil society participation feature highly in the new strategy, as does a re-emphasis on good governance - implicit admissions that previous policies had ignored social concerns.

53. The really new dimension of the programmes is the involvement, or "participation" of civil society actors. However, the format for such participation - usually workshops - and the non-discussion of conditionality make the process appear somewhat cosmetic.[125] The notion of "ownership" by which such participation is guided is also rather perfunctory; are we speaking about ownership by the State, or by the community?[126] Thus, for many observers, HIPC and the PRGF are basically old wine in new bottles.[127] This is particularly on account of the fact that the basic principles and value systems underlying the poverty reduction strategy embodied in HIPC are the same as those which informed the structural adjustment programmes (SAPs and ESAF) that preceded it. Moreover, they still suffer from the lack of sufficient resources necessary to produce real change.[128] More importantly, a recent audit of the Initiative revealed that the Bank and the Fund themselves also believe that the Initiative does not reduce debt to a low enough

level; furthermore, the predictions of export growth were too high, and the problem of HIV/AIDS means that debt levels may rise again.[129] But, in our view, the major problem is that macroeconomic assumptions have priority under the PRGF as they had, under the SAPs/ESAF. Thus, even where the strategy has been welcomed by civil society actors as a fresh and empowering approach to addressing the issues of poverty, the main difficulty, "... lies in attempting to achieve the PRSP objectives without upsetting macroeconomic fundamentals".[130] Such an approach obviously translates into priority being given to the former. The connections between the insistence on macroeconomic discipline and the exacerbation of poverty have been well documented. Under the PRGF, it is still the staff of the Fund and the Bank who retain the authority to decide whether the conditions are being met. Thus it is the institutions that have the final say over the PRSPs, effectively negating the claims of local ownership and participation, and the claim that the IMF has also developed a social conscience.[131] With traditional macroeconomic orthodoxy in place, the fundamental problems remain - the MLIs are looking at the problem through the wrong lenses. The NPA is thinly disguised conditionality which still fails to take on board a critical human rights perspective in its approach to the issue of debt reduction. We thus return nearly to square one. In the following section of this study, the Special Rapporteurs suggest some measures that are essential if the international community is to ensure that the MLIs (including the WTO) are not in violation of fundamental human rights.

III. INTERNATIONAL HUMAN RIGHTS LAW AND ITS APPLICABILITY TO MULTILATERAL INSTITUTIONS: TOWARDS A RESTATEMENT

54. From the preceding analysis, and indeed from the findings of our preliminary study, it is quite clear that apart from TNCs, the policies and operations of MLIs such as the World Bank, the IMF and the WTO have the most significant implications for the full observance and protection of human rights in the era of globalization. With respect to TNCs, the United Nations, MLIs such as the OECD and the ILO, and the Sub-Commission itself have considered the need to elaborate codes of standards or conduct that conform to international human rights, and indeed such instruments exist in abundance. In contrast, the Special Rapporteurs note that there has not been a similar attempt to clarify and codify the human rights obligations of MLIs.[132] With respect to the World Bank, the Inspection Panel established in 1993, and the 1998 guidelines, *Development and Human Rights*, were positive steps in the right direction. Both were nevertheless limited in their potential - the Panel in terms of its operational rules and scope of coverage,[133] and the latter in respect of the selectivity of rights given attention. In a welcome change from its erstwhile orthodoxy and secrecy, the Executive Board of the IMF produced a document outlining certain views on good governance. On closer scrutiny, however, one can discern only an oblique connection to human rights in a document that is essentially about effective financial accounting and management.[134] Moreover, the basic concern of the IMF was the promotion of good governance in member countries, and not applying the same standards of operation at the Fund. The endorsement of greater openness and clarity at the Fund with respect to its programmes is also welcome,[135] but it is clearly limited in terms of guaranteeing that the Fund can be made genuinely accountable to the people on whom its policies have the most adverse impacts. Since Seattle, the WTO has sought to make the organization more accessible and understood by those interested in its operations.[136] This has primarily taken the form of consultations with members, in a bid to improve internal transparency.[137] All three organizations host extensive Web sites that provide a wealth of information and insights into their operations.

55. The above developments must all be welcomed. However, there is still a problem. Given the nature and character of multilateral institutions and their growing influence on the realization of international human rights, the Special Rapporteurs believe that much more needs to be done. Principally, there is need for a systematic elaboration of the manner in which MLIs are bound by the Universal Declaration of Human Rights, the International Covenants and other human rights instruments. In short, there is a need for a *restatement* or codification of the law, in its applicability to MLIs. We take this view because MLIs like the World Bank, the IMF and the WTO seem initially to have had particular difficulty in coming to terms with the notion that they too are bound by international human rights principles. This is manifest in both the reforms that they have been willing to make, but, more importantly, in those areas of policy and operations where there has been little or no change.

56. Such inertia is especially manifest in the MLIs' interpretation of their international legal obligations. In response to the argument that human rights are indivisible and interdependent, and consequently that the World Bank should use its financial power and political influence to urge greater observance of human rights, former Bank Vice-President Ibrahim Shihata argued that such an obligation "... does not mean that each international organization must concern itself with every and all human rights". Pointing to the legal character of the Bank, he concluded:

> "Each of these organizations is a juridical body, the legal capacity of which is confined by its respective mandate as defined in its charter. It does not belittle any international organization if its charter specifies its specialized functions in a manner that excludes concern for certain aspects of human rights. But it demeans the organization to ignore its charter and act outside its legal powers. This is simply a matter of specialization of international organizations."[138]

The idea that the Bank is not guided by rules other than its own is one that finds fairly consistent expression in a good number of its interpretative statements.

57. The Special Rapporteurs discerned the same ambivalence in the response of the WTO to the queries issued in preparation for the present study. The WTO's legal framework, and even the basic principles on which it is constructed, cannot be said, prima facie, to violate human rights. Indeed, as the United Nations Secretary-General has pointed out, "... the guiding principles can be said to mirror, to some extent, the principles of human rights law and, as such, to provide an opening for a human rights approach to the international trade regime".[139] However, the WTO has itself not gone much further in developing this opening. The following was the response elicited from the organization regarding its position on the obligation to respect universal human rights norms:

> "... while the multilateral trading system can help to create the economic conditions which contribute towards the fulfilment of human rights, it is not within the mandate of the WTO to be a standard setter or enforcer of human rights. Unlike most human rights law, WTO Agreements generally specify rights and obligations between States and not

between States and individuals. WTO Agreements do not create or articulate human rights as such, but do facilitate a climate necessary for economic prosperity [and] the rule of law and seeks to curb unilateral action and abuses of power in international trade. These are all-important elements necessary for the respect of human rights."[140]

Our understanding of the above position was that it rested on two main bases: first, that it is the States members of the organization that were responsible for respecting human rights. In other words, the organization has no legal obligation either to articulate or to enforce human rights standards. Second, that the WTO agreements do not specify obligations between States and the individual - they specify those between member States, implying once again that the enforcement of agreements do not necessarily concern human rights. In this respect, the WTO position bore some resemblance to that taken by the Bank and the Fund. We find both these positions problematic under international law and, more specifically, under the Marrakesh Agreement, especially where the second position is concerned.

58. In the preliminary report of this study we discussed at length the international legal obligations of States relating to human rights protection. We pointed out that States - beginning with the Charter of the United Nations and the International Bill of Human Rights - are subjected to a primary obligation to promote and protect human rights and that those obligations cannot be negotiated away when States function in another forum. To borrow from paragraph 1 of the Vienna Declaration and Programme of Action, the "... promotion and protection [of human rights] the first responsibility of Governments". We may add that where States Member of the United Nations are concerned, if any other obligations conflict with international agreements to which they are party, their obligations under the Charter shall prevail.[141] Similarly, we pointed out that intergovernmental organizations such as the WTO and the Bretton Woods institutions are essentially creatures of the international legal system. Therefore, they cannot be deemed to be exempt from fundamental principles of international law such as the obligation to respect universal human rights norms. Although international organizations consist of member States, they function on the basis of collective decision-making by their representative organs. So, too, the WTO.[142] Once decisions are made collectively one cannot disaggregate such actions and attribute them to individual member States. Member States are then obliged to discharge their obligations undertaken qua members pursuant to those collective decisions, and will be held individually responsible under international law for the breach thereof. Their obligations under the Charter supersede other international legal obligations. In sum, they have no choice but to give primacy, inter alia, to human rights obligations.

59. But the main issue at stake is not what individual members do in implementing the rules, regulations and policies of an international organization, even if this can have some impact on addressing concerns of equity and inclusion.[143] Rather, it is the policies themselves and their impact that are at issue. What is at stake is whether the WTO *institutionally* recognizes that it is under an obligation to respect the basic tenets of international law spelt out in the Charter of the United Nations, principles of customary international law and, indeed, principles of jus cogens. What is the WTO as distinct from its membership? As an international organization, it is not merely an aggregate of the legal personality of its member units. It enjoys separate legal personality; it not only has rights, but also international obligations. This is a fundamental principle of public international law recognized in article VIII of the WTO Agreement, conferring WTO with legal personality and capacity, as well as the usual privileges and

immunities necessary for the exercise of its functions. In this regard, the assertion that it is up to individual members to respect human rights lacks sufficient merit. We reiterate the position taken in our previous report that the WTO qua an international organization, created and functioning under general principles of international law, is bound to respect fundamental principles of international human rights law which form part of those general principles of law. For example, could the WTO facilitate the formulation of policies that result in entrenched gender discrimination or the extreme use of child labour - and the causal connection is very clear - and yet maintain it has no legal responsibility to change such policies? If the answer is in the affirmative, then such a position is a grave threat to the international rule of law.

60. On the position that the WTO agreements deal only with obligations between the organization and States and not between States and individuals, article III of the WTO Agreement identifies the role of the organization as facilitating "the implementation, administration, operation, and further[ing] the objectives, of this Agreement and of the Multilateral Trade Agreements, and ... also ... of the Plurilateral Trade Agreements". However, a full reading of the Agreement makes it clear that the parties thereto did not intend to adopt a trade regime merely for its own sake. As the preamble to the Agreement declares, parties recognize that their relations in the field of trade and economic endeavour should be conducted with a view to, inter alia, raising standards of living and ensuring full employment and a large and steadily growing volume of real income and effective demand. In other words, human development and well-being is a central concern of the trade regime under the WTO. This position was accepted in full in the statement made by the WTO representative at the second session of the United Nations Working Group on the Right to Development held in Geneva from 29 January to 2 February 2001, in reiterating the "... similarity between the basic principles of the WTO and the United Nations Charter". He also referred to the WTO process of multilateral negotiations as being an effort to operationalize the right to development. Such recognition by the WTO before a United Nations human rights forum is significant. Taken to its logical conclusion, this position recognizes that policies and activities of the organization that do not accord with such developmental obligations are against the objective and purpose of the Marrakesh Agreement. Even though the agreements per se do not specify obligations between States and individuals, the objective and purpose of their enforcement has the individual as a central concern.

61. Against the background of the preceding analysis, it becomes necessary to revisit the issue of the duties and obligations of MLIs with respect to human rights. While duly acknowledging the distinct character of each of the three institutions examined in this report, there are sufficient similarities to allow us to begin to approach the issue of their obligations from a common point of departure. Of particular use is the formula provided by Asbjörn Eide in relation to the realization of economic, social and cultural rights, namely, the duties to *respect, protect* and *fulfil*.[144] Roger Normand adds the duty to *recognize* as another dimension to this typology which "... not only imposes an obligation on States to ratify human rights treaties, but also on non-State actors to accept human rights responsibilities".[145] Within the context of discussions about globalization and the place of MLIs, the duty to recognize assumes a particularly high profile. Moreover, the duty to recognize cuts across the board and relates to civil and political rights too. The Special Rapporteurs believe that given the ambivalence of MLIs towards the duty to recognize, this must indeed be the necessary first step, without qualification or selectivity.

62. As Sigrun Skogly points out in an early examination of the place of international human rights in World Bank operations, there are at least two dimensions from which the issue of human rights recognition can be approached: (i) should it (the Bank) impose human rights conditionality; or (ii) what is the effect of the Bank's policies on domestic human rights contexts? [146] In our last report we gave our considered opinion as to why the principle of human rights conditionality is generally not an option that should be given further consideration or support. But certainly, it should be incumbent upon MLIs to avoid adverse human rights effects resulting from the institutions' own policies. Doing so would mean that an obligation exists for the organizations to actively search for alternative ways to achieve the economic purposes of their policies. Those alternatives would have to be in compliance with human rights standards that are well articulated. Skogly once again: "Any actor should in principle be held accountable for the effects of its own actions."

63. Viewed from the above perspective, it is clear that there are a number of ways in which a restatement of the human rights obligations of MLIs can be formulated. In the first instance, it should commence from the assertion that *all* human rights must be recognized and protected during the process of development; as the Declaration on the Right to Development clearly states, there is no human right that is not implicated by the development process. Secondly, it should incorporate a non-retrogression principle, i.e. MLIs have a duty not to take measures that would cause a reversal of existing social achievements in the particular countries to which their policies and operations are applied. Indeed, they should take pro-active measures in support of the promotion of those sectors of the economy in which such achievements, e.g. health, education and shelter, inter alia, have been made. If those achievements are placed under threat by the application of their policies, the obligation should exist to review those policies. This entails a more aggressive and well-articulated approach within the MLIs to Human Rights Impact Assessments (HRIAs). Indeed, the poverty eradication rhetoric now in vogue at the MLIs needs to be matched by critical assessments of whether the macroeconomic policy measures that continue to be applied are compatible with the goals of poverty eradication.

64. The process of restating the law should of course revisit the two principal instruments that have been developed with the intention of ensuring that economic, social and cultural human rights are accorded more respect, *viz.*, the Limburg Principles and the Maastricht Guidelines. Can't the "violations approach" be applied to the policies of MLIs? In the same way, it is necessary to take the "good governance" principles applied by the MLIs and to consider whether their own practices, policies and structures are up to the mark. In this respect, issues such as institutional accountability incorporating notions of transparency, independent (and external) evaluation of policies and sufficient and effective remedies will be of special concern. In short, we are calling for a renewed commitment to social responsibility, informed by the well-known standards enshrined in the international human rights instruments. It is our contention that the application of human rights standards should be the starting point from which the MLIs embark upon the formulation of their policies, rather than a point of reference when things have gone wrong. In this regard, civil society also has a fundamental role to play.

IV. CIVIL SOCIETY AND GLOBALIZATION: ENHANCING THE POSITIVE, COMBATING THE NEGATIVE

65. At a recent meeting held in the Indian city of Hyderabad, WTO Director-General, Mike Moore made the following statement: "Let me run through last year's achievements. First, we welcomed six new members: Jordan, Georgia, Albania, Croatia, Oman and Lithuania. While a few thousand protested in the streets of Seattle, Washington, London or Prague, 24 million people joined the WTO last year."[147] The logic that counted 24 million more people into the WTO appears to be based on the unduly optimistic assumption that public opinion in member countries on WTO policies is homogeneous. It believes that by the mere accession of a country to the Marrakesh Agreement, the policies and activities of the organization have been fully endorsed. While it is true that a stratum of society in many countries has embraced and benefited from the policies of trade liberalization, the active opposition of hundreds of thousands of ordinary people adversely affected by these policies should be cause for some modesty, caution, and considerable introspection. There are millions who are latent opponents of the impact of various aspects of the policies of economic liberalization. If indeed the goal of the MLIs is to win over more supporters and make adherents of sceptics and opponents, it is a mistake to gloss over that reality. There has to be a serious attempt at examining and understanding why there is such vocal, and sometimes violent, opposition to the regime.

66. Barely two decades ago, one could say that international civil society largely stood aloof from the debate about globalization and its impact on the observance and protection of human rights. Such attitude stemmed from a long-standing bias towards civil and political rights, while largely eschewing advocacy and action on economic, social and cultural rights.[148] First, in relation to the structural adjustment programmes of the Bretton Woods institutions and currently, in a more organized and vociferous manner, concerning the WTO regime, civil society is making its voice heard. If the 1960s and 1970s were characterized by social movements against political oppression on the part of the State, today's campaigns are increasingly being targeted against big business, multinational giants, the Bretton Woods institutions and the WTO. While the earlier movements addressed mainly violations of civil and political rights, today there is a concern with the onslaught on economic, social and cultural rights - on labour rights, the rights to food and water, health care, adequate housing, social security, and the right to education. The concern for the implications of the increased globalization of the world has increased to such an extent that it is not rare for human rights organizations - including the most traditional among them - to raise the issue as one of fundamental importance to the respect for human rights. Human Rights Watch introduced its most recent annual report with a review of the contemporary global economy.[149] This development represents both the all-encompassing nature of the phenomenon of globalization, as well as a growing awareness of the inter-connection of both categories of rights. In short, globalization affects economic, social and cultural rights as much as it does civil and political rights. Civil society has become acutely aware of this fact.

67. This multidimensional approach has witnessed the mass mobilization of civil society groups not only within countries in Asia, Africa and Latin America, but also in the affluent States of northern America and Europe. These movements have brought together varied interest groups. Organizations dealing with traditional human rights issues, women's rights, children's rights, labour, environment, agriculture, development, health care and other social justice issues are joining hands in common cause. This characterizes the current pattern of mobilization of

groups, both within countries as well as internationally, that are campaigning against issues of globalization. It would be a serious mistake to dismiss these movements as purely ideologically based, in atavistic search of a new "ism" to hate.[150] If the processes of economic liberalization and all that this entails were more democratic, participatory, and offered the real possibility of a good life for the larger masses and not merely statistics, it is hard to imagine that these protest movements would draw the popular support they enjoy today. Positions and strategies may differ between the movements in North and the South, and indeed there is a need to be sensitive to the danger of civil society groups duplicating the hegemonic and marginalizing tendencies of the countries from which they come. On the whole, however, there is significant common ground, as in the case of concern for labour standards and opposition to, for example, the methods of operation of TNCs and the human rights consequences of TRIPS. Neither is it only the so-called "radical type" of civil society actors who are critics of the current drive to impose a uniform global economic ideology.[151]

68. Given the diverse points of view articulated by different groups in society, it is imperative that there be space both at domestic and international levels for enhanced dialogue between civil society and local and global macroeconomic decision-makers, greater participation in the decision-making processes and accommodation. The linkage between an open economy and an open society has often been made. What civil society movements have to say is a vital component of the marketplace of ideas that forms the backbone of a genuinely free society. This is precisely why increased external transparency of the MLIs is of the essence.[152] It is equally important that they take opposing claims into serious consideration if their policies are to evolve in a credible and balanced manner. They cannot be forced on societies as unassailable and uncontroverted dogma that offers the only path to economic salvation.

69. While the debates about globalization rage, one cannot help but notice that civil society movements are benefiting from other processes of globalization. Universal norms of human rights and democratic governance and international environmental standards have provided civil society actors from various corners of the globe with a common framework of values to assess and critique the neoliberal economic regime. The breadth of universal human rights standards, for example, which emphasize economic, social and cultural rights and the principle of indivisibility of rights often has no comparison in domestic legal regimes. Information technology - mainly in the form of the Internet - has been indispensable to the sharing of information and viewpoints and in forging networks. This factor has to be borne in mind when attempting to understand civil society responses to globalization. It is too simplistic to divide the world into pro- and anti-globalization camps. Some processes of globalization have found a greater degree of acceptance than others because those processes have a resonance with basic human aspirations. If, indeed, the forces of globalization meet those aspirations by realizing the universal desire for human dignity, equality and justice, there will be no further reason or justification, or indeed desire, for civil society to oppose them. Thus, civil society must take advantage of the positive aspects of globalization, "... while continuing to challenge, critique, and resist others".[153]

70. At the same time, civil society needs to revisit some of its tactics. Although the WTO and TNCs have become a major preoccupation of its campaigns, sight should not be lost of the role and place of States - particularly the powerful ones - in driving and shaping the global economy.[154] This means that some time and energy must be directed towards pressurizing

Governments to develop rules and regulations that include, or at a minimum are sensitive to broad human rights concerns. At individual country levels, the necessity for the inclusion of civil society actors in discussions about economic policy cannot be gainsaid. As we have already pointed out, the MLIs have come round to recognizing that such actors are fundamental to the overall acceptability and domestic ownership of their programmes, as well as to the potential for their success in the long run.[155] Nevertheless, civil society must always be careful not simply to allow themselves to be used for the purpose of legitimizing the actions of the MLIs when the substance of the programmes it is endorsing remains very much the same. Drawing from the case of Uganda - an HIPC country that is widely claimed to have made significant advances in the evolution of strategies to confront poverty - one participant in the processes of consultation has argued,

> "There is no doubt that participation in any form adds value to whatever is being done. Some participation is better than none. But the value of participation is in incorporation of the views of people, not just in seeking them. However, the tendency has been that irrespective of any amount of participation, those seeking people's views disregard them when they are not in line with their pre-designed views ... The amount of participation undertaken seems not intended to change the fundamentals but to make the policies more acceptable to more people because, 'they come from the people themselves'. If that is the case, then it is not participation. It is a hoax."[156]

71. Civil society organizations must also utilize different and novel strategies to confront the pernicious effects of globalization, whether at the macro- or the microeconomic level. One institution that has barely been used in many countries faced by problems of poverty and marginalization is the courts. And yet, the national jurisprudence on the realization of economic, social and cultural rights from courts in countries as diverse as South Africa, India and the Philippines illustrates how much can be done in the quest to eradicate poverty and the debilitating consequences of globalization.[157] The emerging trend in some developed countries to hold TNCs responsible for extraterritorial abuses is one that deserves support. For example, in Doe v. Unocal, a United States Federal Court upheld a cause of action brought against Unocal for its involvement in a pipeline construction project in Myanmar linked to serious human rights abuses.[158] Of course, the full realization of this trend is fraught with challenges, but they are challenges worth meeting. The motivating forces behind globalization may appear distant and remote, but their effects are quite close and direct. Taking those forces on with strategies that are tried and tested may result in some gains for those who otherwise have no recourse to justice.

V. CONCLUSIONS AND RECOMMENDATIONS

72. This report has focused on only a handful of the many issues that arise in the debate over the impact of globalization on the full enjoyment of human rights. Nevertheless, it is quite clear that the issue should remain of concern to the human rights community in general and to the Sub-Commission in particular. It is becoming increasingly clear that the major institutions involved with the processes of globalization have also taken on the issue. Those efforts deserve commendation and support to the extent that they will assist in ensuring that the human rights framework is incorporated as part and parcel of these processes. In this respect, the Special Rapporteurs are eager to ensure that all those concerned with the processes of globalization and

their varied impacts move away from policies that are not rooted in a perspective that gives human rights pride of place. To the extent that the policies and practices of the institutions and organizations studied in this progress report have fostered a global bounty of considerable proportions, it is only just that the benefits of that bounty be shared equitably. If, on the other hand, those policies have resulted in an exacerbation of poverty, a diminution of standards of livelihood, and a further distortion of existing social and global imbalances, we believe it is only just that there be a mechanism to bring those institutions to account. Our main conclusion is that while much has been achieved in the struggle to apply these principles to *every individual* (human, corporate or multilateral), much still remains to be done. This necessarily requires a heightened vigilance on the part of States, members of civil society and all those concerned with the promotion and protection of human rights.

73. With respect to the specific issues tackled in this report, i.e. intellectual property rights, dispute settlement at the WTO and the poverty-related practices of the MLIs, a number of conclusions and recommendations can be made. Concerning IPRs, there is no doubt that there has been considerable contention over the scope and purview of the provisions in the TRIPS Agreement (among them articles 7, 8, 30 and 31) that seek to ameliorate the adverse consequences of full IPR protection. While these provisions were ostensibly designed to create the "balance" that has been described as the essence of the regime of law set in place, there is a need to strengthen them. With particular attention to the issue of essential drugs, while the issue remains under review it would be helpful for WTO member States to emerge with a specific, unequivocal undertaking to the effect that no provision in the agreement prohibits members from taking measures to provide access to medicines at affordable prices and to promote public health and nutrition. Such an undertaking should give priority to the human rights framework elaborated in this report. Some thought should also be given to allowing member States to establish a sui generis regime of protection in the area of pharmaceuticals given their critical relationship to the full enjoyment of human rights. This would allow for the debate over the issue to extend beyond the narrow context of the incentives/price differentials debate, and ensure that the critical components of a human rights perspective are taken into account, while at the same time moving away from a situation of monopoly rights in such a crucial area of human existence.

74. Concerning the debate around the issues generated by article 27.3 (b), it is also fairly evident that much assistance is still required in the efforts to design effective means of conceptualizing, recognizing and protecting traditional knowledge, as well as of establishing a sui generis regime for plant variety protection. In this respect, the difficulties of both a practical and a political nature should be duly recognized. Account should thus be taken of the extralegal forces rooted in the political economy of the processes of globalization - some of which are embedded in "TRIPS-plus" measures - that have a significant impact on this whole discussion. It is all the more reason for the discussions and negotiations that do take place within multilateral contexts to pay particular attention to the global imbalances of power, resources and influence that confront so many of the countries that sit around the table, and thus to adopt the maximum possible flexibility with respect to the implementation of the provisions of the Agreement. The obligations within TRIPS and those in various human rights instruments relating to international cooperation and assistance should hence be given more attention, together with issues like IPRs and indigenous knowledge or the right to food, which have only been dealt with in passing in this report. Likewise, the mechanisms of dispute resolution at the WTO that have come to play

such a critical role in the evolving framework of trade negotiations should be reviewed critically in order to enhance their sensitivity to the concerns of those who might be left out of the benefits of the system.

75. This report has elaborated in broad terms upon some of the principles that we believe would be essential for the construction of a framework that brings the policies and operations of MLIs into closer conformity with fundamental human rights standards. Once again, for there to be positive movement on this front, there is need for various stakeholders with an interest in this area to forge a greater unity of conception, approach and resolution with respect to the many questions that arise. Those stakeholders include, on the one hand, the MLIs, the WTO and critical actors in the United Nations family such as WIPO, UNCTAD, UNDP and WHO (to mention only a few) whose operations are critical to the evolving processes of globalization. On the other hand, are civil society, academia and the member States of the international community. Means must be found of increasing the dialogue about these issues, and to pursue the discussion beyond the context of the Sub-Commission. Critical in this regard is the elaboration of minimum guidelines (or a restatement) that can be relied upon as a human rights benchmark of acceptable conduct in pursuing the ends of globalization on the part of the institutions that are designing the policies and processes most closely associated with the phenomenon. In the final part of this study, the Special Rapporteurs will present their proposals regarding the guidelines and mechanisms necessary to deal effectively with the phenomenon of globalization and its varied impacts on the full enjoyment of human rights. It will also consider further measures necessary to ensure that the United Nations human rights regime is strengthened to address the challenges presented.

Notes

[1] See E/CN.4/Sub.2/2000/13.

[2] See also Sub-Commission resolution 2000/7, "Intellectual property and human rights".

[3] IMF Staff, IMF Lending to Poor Countries - How Does the PRGF differ from the ESAF? Issues Briefs, 30 April 2001, accessed at: http://www.imf.org/external/np/exr/ib/2001/043001.htm.

[4] See James Mittelman, "Globalization: captors and captives", Third World Quarterly, vol. 21, No. 6, 2000, pp. 917-929.

[5] See Globalization and its impact on the full enjoyment of all human rights: preliminary report of the Secretary-General (A/55/342), 31 August 2000.

[6] See E/CN.4/Sub.2/2000/13 and E/CN.4/Sub.2/1999/11.

[7] See "The case for globalization", The Economist, 23 September 2000, pp. 19-20.

[8] B.S. Chimni, "Globalization, Humanitarianism and the Erosion of Refugee Protection", Journal of Refugee Studies, vol. 13, No. 3, 2000, pp. 243-263.

[9] Abdurahman Aden, "No connection under this number: Africa and the Internet", Development and Change, No. 5, 2000, p. 24.

[10] Othman and Kessler argue that globalization processes "... do not together add up to any simple, obvious, natural, irresistible good ... They may just amount to a very mixed, contingent, jumbled and mutable 'package': one whose various contents may change in intensity and even character, independently of one another, over time". Norani Othman and Clive Kessler, "Capturing globalization: prospects and projects", Third World Quarterly, vol. 21, No. 6, 2000, p. 1025.

[11] Griselda Vega, "Maquiladora's lost women: the killing fields of Mexico: are NAFTA and NAALC providing the needed protection?" Journal of Gender, Race and Justice, vol. 4, No. 1, 2000, at p. 137. See also Marilyn Carr, "Gender implications of globalization (with specific reference to the Asian financial crisis)", paper presented at International Women's Week round table, Ottawa, 10 March 1998.

[12] See Nichola D. Kristof and Sheryl WuDunn, "Two cheers for sweatshops", New York Times Magazine, 24 September 2000, p. 71. But also see Marzia Fontana, Susan Joekes and Rachel Masika, Global Trade Expansion and Liberalization: Gender Issues and Impacts, Department for International Development (United Kingdom), January 1998.

[13] Joseph Stiglitz, "Trade and the developing world: a new agenda", Current History, November 1999, p. 390.

[14] See Cynthia M. Duncan, Worlds Apart: Why Poverty Persists in Rural America, New Haven/London, Yale University Press, 1999, p. 188. On the situation in East Asia, see Yash Ghai, "Rights, social justice and globalization in East Asia", in J. Bauer and D. Bell (eds.), East Asian Challenge to Human Rights, Cambridge University Press, 1999, p. 258.

[15] Ali Mazrui, "Shariacracy and federal models in the era of globalization: Nigeria in comparative perspective", presentation made at the International Conference on the Restoration of Shariah in Nigeria: Challenges and Benefits, London, 14 April 2001, p. 3.

[16] While there has been a tendency to dismiss the protests as inconsequential, they have certainly had some impact on the debate about globalization and its main actors, i.e. MLIs and TNCs. See "Angry and effective", The Economist, 23 September 2000, pp. 85-87.

[17] Countries as diverse as Australia, Norway and Mexico were rocked by anti-globalization protests. See "Riots on May Day", The New Vision, 2 May 2001, p. 19 and "Calm after May 1 protests", The New Vision, 3 May 2001, p. 24.

[18] Some writers have described them simply as "cranks". See Martin Wolf, "What the world needs from the multilateral trading system", in Gary P. Sampson (ed.), The Role of the WTO in Global Governance, United Nations University, Japan, 2001, p. 188.

[19] Balakrishnan Rajagopal, "Taking Seattle resistance seriously", The Hindu, 11 December 1999; at: http://www.hinduonline.com/today/stories/05112524.htm.

[20] Brian K. Murphy, "International NGOs and the challenge of modernity", Development in Practice, vol. 10, Nos. 3 and 4, 2000, p. 332.

[21] See David Gantz, "Failed efforts to initiate the 'Millennium Round' in Seattle: lessons for future global trade negotiations", Arizona Journal of International and Comparative Law, vol. 17, 2000, pp. 351-352.

[22] See Marwaan Macan-Markar, "Anti-globalists force first debate with Davos", The East African, 5-11 March 2001.

[23] Anne Orford, "The subject of globalization: economics, identity and human rights", the American Society of International Law, ASIL Proceedings, vol. 94, 2000 p. 24.

[24] See Committee on Economic, Social and Cultural Rights, Statement on globalization and economic, social and cultural rights, adopted by the Committee on 11 May 1998 at its eighteenth session (E/1999/22), chap. VI, sect. A.

[25] Antony Anghie, "Time present and time past: globalization, international financial institutions and the Third World", New York University Journal of International Law and Politics, 2000, at p. 249.

[26] Susan Tiefenbrun, "Free trade and protectionism: the semiotics of Seattle", Arizona Journal of International and Comparative Law, 2000, p. 259.

[27] John Cuddy, "The state of least-developed countries", BRIDGES, Year 5, No. 4, May 2001, p. 3.

[28] UNCTAD, The Least Developed Countries 2000 Report, Geneva, 2001.

[29] Steve Charnovitz, "The globalization of economic human rights", commentary on papers by Frank Garcia and Mark Warner; accessed on 22 April 2001 at: http://www.geocities.com/charnovitz/Brooklyn.htm.

[30] Article 27.2 states: "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is author", while article 15.1 (c) refers to the right of everyone to "benefit" from these interests.

[31] See Samuel K. Murumba, "Globalizing intellectual property: Linkage and the challenge of a justice-constituency", University of Pennsylvania Journal of International Economic Law, vol. 19, No. 2, 1998, p. 435.

[32] See, WTO, Introduction to the WTO: Trading Into the Future, 2nd edition, 2000, p. 25. For a broader discussion, see Bernard Hoeckman and Michel Kostecki (eds.) The Political Economy of the World Trading System: From GATT to WTO, Oxford University Press, 1995, pp. 146-149.

[33] See Dot Keet, "Globalization, the World Trade Organization and the implications for developing countries", Law, Democracy and Development, vol. 3, No. 1, 1999, pp. 32-34.

[34] See, Wend Wendland, "Intellectual property and human rights: working draft" (E/C.12/2000/19), paper presented at the twenty-fourth session of the Committee on Economic, Social and Cultural Rights, day of general discussion on article 15.1 (c) of the Covenant organized in cooperation with WIPO, para. 53.

[35] Such concerns have been at the heart of the positions adopted by many developing countries and LDCs since before the 1999 Ministerial Conference at Seattle, and continue to be at the forefront of the debate. See the TRIPS Agreement, communication from Kenya on behalf of the African Group (WT/GC/W/302), 6 August 1999 and submission by the African Group and other developing countries at the TRIPS Council special discussion on access to medicines (IP/C/W/296); accessed at: http://www.wto.org.

[36] Until the Uruguay Round, the issue of greater protection of IPRs had been confined to WIPO, but without resolution, largely on account of developing country resistance. It is believed that those countries conceded to TRIPS because they believed they had gained concessions elsewhere in the round. See Marco Bronckers, "Better rules for a new millennium: a warning against undemocratic developments in the WTO", Journal of International Economic Law, vol. 2, No. 4, 1999, pp. 548-549.

[37] Murumba, op. cit., p. 440.

[38] Ibid.

[39] Peter Drahos, "Human rights, globalization and intellectual property rights", paper presented at the CESCR/INCHRITI (International NGO Committee on Human Rights, Trade and Investments) workshop on 19 August 2000, Palais Wilson, Geneva.

[40] Vandana Shiva, "Biotechnology development and the conservation of biodiversity", in Vandana Shiva and Ingunn Moser (eds.) Biopolitics: A Feminist and Ecological Reader on Biotechnology, Zed Books/Third World Network, London/New Jersey/Penang, 1995, p. 207.

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[42] See David Woodward, "Effects of globalization and liberalization on poverty: concepts and issues", in UNCTAD, Globalization and Liberalization: Effects of International Economic Relations on Poverty (UNCTAD/ECDC/PA/4/Rev. 1), New York/Geneva, 1996 at pp. 36-37.

[43] Oxfam, Fatal Side Effects: Medicine Patents Under the Microscope, 2001.

[44] See Oxfam, Patent Injustice: How World Trade Rules Threaten the Health of Poor People, 2001.

[45] Cf. Carlos M. Correa, Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options, Zed/Third World Network, London/New Jersey, Penang, 2000, pp. 2-3 and esp. p. 9.

[46] Cf. Draft Conclusions and Recommendations adopted at the High-Level Brainstorming Meeting for African Trade Negotiators Preparatory to the Fourth WTO Ministerial Conference 26-29 June 2001, Addis Ababa.

[47] See "Brazil-US reach agreement in IPR dispute", in BRIDGES Weekly Trade News Digest, vol. 5, No. 24, 26 June 2001; accessed at: http://www.ictsd.org/html/weekly/26-06-01/story2.htm.

[48] See Godfrey Gunatilleke and Aleya El Bindari Hammad, Health: The Courage to Care, Geneva, 1997, p. 12.

[49] See Sisule F. Musungu, "Globalization: implications for the right to health in sub-Saharan Africa", paper for the LL.M (Human Rights and Democratization) module on Globalization and Human Rights, University of Pretoria, March 2001.

[50] Z. Mirza, "WTO, pharmaceuticals and health: impacts and strategies", International Round Table on "Responses to globalization: rethinking equity in health", Geneva, 12-14 July 1999, p. 21.

[51] WHO, "Globalization, TRIPS and Access to Pharmaceuticals", WHO Policy Perspectives on Medicines: WHO Medicines Strategy: 2000-2003, No. 3, March 2001, (WHO/EDM/2001.2) p. 4.

[52] See articles 6 and 31 of the TRIPS Agreement.

[53] The law in Kenya faced concerted lobbying by the pharmaceutical companies against its passage. See, Dagi Kimani, "Politics derails HIV generic drugs bill", The East African, 7-13 May 2001, p. 32.

[54] David K. Tomar, "A look into the WTO pharmaceutical patent dispute between the United States and India", Wisconsin International Law Journal, vol. 17, No. 2 1999, p. 579.

[55] Act No. 90 of 1997, Government Gazette 18505, 12 December 1997.

[56] Ed du Plessis, "The TRIPS Agreement and South African Legislation: the case of the parallel importation of medicines", Law, Democracy and Development, vol. 3, No. 1, 1999, pp. 62-63.

[57] Laurice Taitz, "It's the 'evil empire' versus Captain Africa", Sunday Times, 4 March 2001; accessed at: http://www.suntimes.c.za/2001/03/04/insight/in02.htm.

[58] Samanta Sen, "AIDS: more legal battles in the offing", The East African, 23-29 April 2001, p. 7.

[59] Ibid.

[60] See Robert Howse and Makau Mutua, Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization, International Centre for Rights and Democratic Development, 2000, p. 19.

[61] See Report of the WTO Appellate Body, "India-Patent Protection for Pharmaceutical and Agricultural Chemical Products", (WT/DS50/AB/R) 19 December 1997 and Tomar, op. cit.

[62] WTO, "Brazil - Measures Affecting Patent Protection: Request for the Establishment of a Panel by the United States" (WT/DS199/3), 9 January 2001.

[63] Oxfam, "Drug Companies vs. Brazil: The Threat to Public Health", Oxfam GB Briefing Paper, May 2001; accessed at: http://www.oxfam.org.uk/policy/papers/ctcbraz.htm, pp. 3-4

[64] Ibid., pp. 13-14.

[65] The most recent initiatives have been spearheaded by the multinational giant Pfizer, with the launch of a US$ 12 million facility for HIV/AIDS training and research in Uganda. See Charles Wendo and Felix Osike, "Museveni backs AIDS drug companies", The New Vision, 12 June 2001, p. 1.

[66] The issue of access to drugs was considered in a special discussion of the WTO TRIPS Council held from 18 to 21 June 2001. The intention of the discussion was to clarify the interpretation and application of the relevant provisions of the TRIPS Agreement, with "... a view to clarifying the flexibilities to which members are entitled under the Agreement, and to explore the relationship between the TRIPS agreement and affordable access to medicines". Response of the WTO secretariat to a questionnaire from the Special Rapporteurs (hereafter "WTO Response").

[67] Mike Moore, "Give drugs to the poor and charge the rich", The East African, 12-18 March 2001, p. 30.

[68] Executive summary of the WHO-WTO workshop on differential pricing and financing of essential drugs, Høsbøjor, Norway, 8-11 April 2001, accessed at: http://www.wto.org/english/news_e/news_e.htm.

[69] WTO Response, op. cit., pp. 10-12.

[70] See WTO secretariat, "Protection of Intellectual Property under the TRIPS Agreement" (E/C.12/2000/18), background paper submitted for the day of general discussion on article 15.1 (c) of the Covenant, held during the twenty-fourth session of the Committee on Economic, Social and Cultural Rights, pp. 4-7.

[71] See paper submitted by the EU to the TRIPS Council special discussion on access to medicines (IP/C/W/280), accessed at: http://www.wto.org.

[72] IP/C/W/296, op. cit.

[73] The issue of "bio-piracy" was in contention recently between a university in Zimbabwe and scientists in Switzerland over the snake-bean tree, while a similar dispute has erupted between scientists at Nairobi and Oxford Universities over an AIDS vaccine. See Michael M. Phillips, "Roles are reversed in patent dispute over drug in Africa", The Wall Street Journal, 14 June 2001, p. 1, and John Kamau, "AIDS vaccine snag", The Monitor, 7 May 2001, p. 15.

[74] John Mugabe, Intellectual Property Protection and Traditional Knowledge: An Exploration in International Policy Discourse, Biopolicy International Series No. 21 African Centre for Technology Studies (ACTS) Press, Nairobi, 1999, pp. 13-16.

[75] See Lucinda Jones, "A rights-based approach to intellectual property", paper presented at a WIPO panel discussion on intellectual property rights and electronic commerce, 30 June 2000, p. 5.

[76] Cary Fowler, "Biotechnology, patents and the third world", in Shiva and Moser, op. cit.

[77] Emily Marden, "The neem tree patent: international conflict over the commodification of life", Boston College International and Comparative Law Review, vol. 22, No. 2, 1999, p. 280.

[78] These issues were brought together in the run-up to the Seattle WTO Ministerial Meeting and were amongst the many reasons for the expressed dissatisfaction of the African Group with the proceedings of that meeting. See "The TRIPS Agreement: Communication from Kenya on behalf of the Africa Group" (WT/GC/W/302), 6 August 1999, esp. pp. 3-5.

[79] See Philippe Cullet, "Plant variety protection in Africa: towards compliance with the TRIPS Agreement", Journal of African Law, vol. 45, No. 1, 2001, p. 118.

[80] International Convention for the Protection of New Varieties of Plants (UPOV), Paris, 2 December 1961, as revised on 10 November 1972, 23 October 1978 and 19 March 1991.

[81] Cullet, op. cit., p. 119.

[82] Gary N. Horlick, "WTO dispute settlement and the Dole Commission", Journal of World Trade, 1996, pp. 46-48.

[83] Bruce R. Scott, "The great divide in the global village", Foreign Affairs, vol. 8, No. 1, January/February 2001, p. 160.

[84] Annex 2 to the Agreement Establishing the World Trade Organization.

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[86] WTO secretariat, Overview of the State-of-Play of WTO Disputes, 23 March 2001.

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[91] See Wairama G. Baker, "Impact of the World Trade Organization (WTO) on Uganda", paper presented to the Uganda Law Society conference on "International Trade Law and Uganda: Closing the Gaps", April 2000, p. 4.

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[93] Paragraph 2 of Working Procedures (appendix 3 to the Dispute Settlement Understanding).

[94] Article 14.3 of the Dispute Settlement Understanding.

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[99] Final Proposal on Advisory Centre on WTO Law, 1999; accessed at http://www.itd.org.

[100] Articles 3.12, 8.10, 12.10, 21.2, 21.7, 21.8, 24, 27.2.

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[107] European Communities - Measures Affecting the Prohibition of Asbestos and Asbestos Products, complaint by Canada (WT/DS135).

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[131] Cf. IMF, Social Dimensions of the IMF's Policy Dialogue: A Factsheet, March 2001; accessed at http://www.imf.org/external/np/exr/facts/social.htm.

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ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Promoting the right to development in the context of the United Nations Decade for the Elimination of Poverty (1997-2006)

Report of the Secretary-General submitted in accordance with Sub-Commission resolution 1999/9

Introduction

1. In its resolution 1999/9, entitled "Follow-up to resolution 1996/22 and decision 1998/105", the Sub-Commission on the Promotion and Protection of Human Rights requested the Secretary-General, once again, to invite all relevant United Nations bodies and agencies to step up their action aimed at promoting international cooperation for the realization of the right to development in the context of the United Nations Decade for the Elimination of Poverty (1997-2006), to provide him with information thereon and to transmit annually to the Sub-Commission the information received. [1]

2. During the past decade, a consensus has emerged, recognizing the importance of human rights, including the realization of the right to development as a prerequisite for effectively

[1] Additional information received from United Nations bodies and agencies will be submitted as an addendum.

promoting development and combating poverty. Global conferences in the 1990s highlighted the usefulness of integrating human rights into poverty reduction strategies. In the Millennium Declaration, the heads of State and Government of the States Members of the United Nations pledged to "spare no effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected" and expressed their commitment to "making the right to development a reality for everyone and to freeing the entire human race from want" (General Assembly resolution 55/2 of 8 September 2000, para. 11). For the first time, they recognized explicitly the integral link between the realization of the right to development and poverty reduction. This commitment to realizing the right to development for everyone is very positive and provides a springboard for a renewed commitment to integrate human rights throughout national and international poverty reduction strategies.

3. The Commission on Human Rights, particularly in the context of the mandates on the right to development and economic, social and cultural rights, has paid growing attention to the issue of poverty through the realization of the right to development. For example, both the independent expert on the right to development and the independent expert on human rights and extreme poverty have underlined the strong relationship between the realization of the right to development and poverty eradication (see E/CN.4/2001/WG.18/2 and E/CN.4/2001/54). Further, in its resolution 2000/12, the Commission on Human Rights requested the open-ended working group on the right to development to take into account the work of the independent expert on human rights and extreme poverty in its deliberations. In response to this request, the Office of the United Nations High Commissioner for Human Rights (OHCHR) forwarded the reports of the independent expert on extreme poverty to the working group as background papers. During the last session of the working group, the need for international solidarity and cooperation for realization of the right to development was emphasized, with particular mention of the achievement of the internationally agreed development commitments, including for poverty eradication (E/CN.4/2001/26, para. 191).

4. OHCHR provides substantive and organizational support to the open-ended working group on the right to development, the independent expert on the right to development and also to the various other development-related mandates of the Commission on Human Rights. In particular, the Office assisted the independent expert on the right to development in the organization of his missions to the Philippines, Indonesia, Malaysia and Singapore in 2001. The objective of the missions was to see how these States had managed the financial crisis of 1998. One of the issues for discussion was the effect of policies on the enjoyment of human rights by the poor. The report of the independent expert on these missions will be made available to the Commission on Human Rights at its fifty-eighth session.

5. In 2001, OHCHR has also assisted the independent expert on human rights and extreme poverty in the preparation and conduct of her mission to Bolivia to assess the effectiveness of anti-poverty programmes and strategies by meeting with government officials, representatives of non-governmental organizations and poor people's associations, as well as United Nations and international financial organizations in the country.

6. OHCHR organized an expert seminar on human rights and poverty in Geneva from 7 to 9 February 2001. The expert seminar acknowledged the need for a new text that

would build on existing human rights norms and standards in a manner that explicitly addressed the phenomenon of poverty, and in particular extreme poverty, that would clarify definitional issues through the multidimensional nature of poverty in the light of human rights, and that would set forth relevant operational and policy guidelines. The majority of the participants were clearly in favour of the drafting of a new text which would make an explicit link between human rights and poverty, would enable poverty to be understood in human rights terms and would respond to poverty in human rights terms (E/CN.4/2001/54/Add.1 and Corr.1).

7. The expert seminar recognized that poverty is not just about lack of income. It is also about human rights. The crucial role of participation, empowerment, security and non-discrimination was emphasized by all the participants. On the basis of the outcome of the expert seminar, the Commission, at its fifty-seventh session, requested the Sub-Commission to consider the need to develop "guiding principles on the implementation of existing human rights norms and standards in the context of the fight against extreme poverty" (resolution 2001/31, para. 7 (a)).

8. Through the servicing of treaty-based organs, OHCHR contributes to the realization of the right to development and the alleviation of poverty by promoting human rights covenants and conventions, and the monitoring of their implementation, including through providing support for the reporting process, the development of general comments, and constructive dialogue between States parties and the Committees on matters relating to poverty and development. In particular, the general comments and concluding observations adopted by the Committee on Economic, Social and Cultural Rights are increasingly taking into account the question of poverty eradication. Economic, social and cultural rights are seen by the Committee to be a key vehicle by which economically and socially marginalized people, especially vulnerable groups, can lift themselves out of poverty and obtain the means to participate fully in their communities. In May 2001, the Committee on Economic, Social and Cultural Rights adopted a statement on poverty which recognizes that poverty "constitutes a denial of human rights" and defines poverty as "a human condition characterized by the deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights" (A/CONF.191/BP/7). The Committee is also planning to discuss how to integrate human rights into poverty reduction strategy papers (PRSPs).

9. At the inter-agency level, OHCHR continues its cooperation within the United Nations system for development and poverty eradication and provides support for facilitating integration of the elements of the right to development into the programmes and policies of United Nations system development agencies and programmes, inter alia the ongoing work of the United Nations Development Group; the United Nations Development Assistance Framework (UNDAF)/Common Country Assessment (CCA) framework, and the joint UNDP/OHCHR Memorandum of Understanding (the MoU).

United Nations Development Programme

10. Substantive information received from United Nations Development Programme (UNDP) is summarized as follows:

11. In 1999, UNDP undertook an internal stocktaking of its human rights activities, culminating in the publication of a Survey of UNDP Activities in Human Rights. Given its overall mandate of poverty alleviation and the corresponding focus on social and economic development, UNDP sees all of its activities for the promotion of sustainable development as a contribution towards the right to development. UNDP more explicitly defined its role in the realization of the right to development with the publication of 1998 policy document, Integrating Human Rights with Sustainable Human Development. This was followed by the conclusion of a Memorandum of Understanding (MoU) between UNDP and OHCHR in 1998. The MoU, which in March 2001 entered into its fourth year, sets the framework for the integration of human rights with UNDP development activities.

12. The UNDP Human Development Report 2000 explored the links between human rights and human development and thus contributed to furthering thinking on how to "operationalize" human rights in development programming. The operational aspects of integrating human rights with development will be further explored at a policy round table organized by OHCHR, the Human Development Report Office and the Swedish International Development Cooperation Agency in Alexandria, Egypt in June 2001.

13. The joint UNDP-OHCHR human rights strengthening programme (HURIST), established in 1999, is now operational in 26 countries in Africa, Asia, the Arab region, Latin America and the Caribbean and Eastern Europe/Commonwealth of Independent States.

14. During the last two sessions of the open-ended working group on the right to development (in September 2000 and January 2001), UNDP reflected on the reports of the independent expert and made suggestions on applying a human rights-based approach as a tool for implementing the right to development. Furthermore, UNDP Country Offices continue to provide substantive and logistical support to the missions of the independent expert. In February 2001, UNDP participated in the OHCHR Expert Seminar on Human Rights and Extreme Poverty (7 to 9 February 2001), contributing to the dialogue on the need for a new text on human rights and poverty.

15. UNDP also supports the implementation of the right to development through its collaboration with the human rights treaty bodies. UNDP has collaborated with the Committee on Economic, Social and Cultural Rights since 1998 and is exploring links with the Human Rights Committee. UNDP has recently engaged with these Committees and other United Nations system agencies to exchange experiences and to discuss future procedures for United Nations System-treaty body cooperation.

16. During the period 1999-2000, UNDP organized with the support of OHCHR a series of human rights training workshops for its Resident Representatives. Within the wider context of the United Nations Development Group, UNDP contributes towards the elaboration of human rights training in the context of UDAF/CCA, feeding into the ongoing efforts and activities of the United Nations Staff College. A comprehensive "UNDP training manual on human rights and sustainable development" has just been finalized. Distributed widely, the manual will be used as a human rights training tool by Country Offices of UNDP and other United Nations agencies as well as their non-United Nations development partners at country level.

United Nations Education, Scientific and Cultural Organization

17. Substantive information received from United Nations Education, Scientific and Cultural Organization (UNESCO) is summarized as follows:

18. Under the term of its Constitution, UNESCO accords high importance to the promotion and protection of all human rights, including the right to development. Promoting the right to development is considered by the organization as a powerful means of pursuing the struggle against poverty, which is a flagrant violation of human dignity.

19. UNESCO applies an integrated approach to poverty reduction, engaging all sectors, divisions and units of the organization, and seeks to reach three major interrelated strategic objectives: (a) to contribute to a broadening of the focus of international and national poverty reduction and development strategies through the mainstreaming of education, culture, the sciences and communication; (b) to support the establishment of effective linkages between national poverty reduction strategies and sustainable development frameworks, focusing on the areas of competence of UNESCO, and to help mobilize social capital by building capacities and institutions, especially in the public domain, with a view to enabling the poor to protect their rights; (c) to contribute to the creation of a national policy framework and environment for the empowerment of the poor, participatory approaches and income generation activities.

20. Emphasis will be put on policy formulation and implementation, advocacy and information - stressing that freedom from poverty is a human right -, policy-oriented research, capacity building and innovative cross-cutting field projects.

21. UNESCO strategy is underpinned by ongoing development initiatives, including outcomes of, and targets adopted by, international conferences and the use of existing mechanisms such as the Common Country Assessment. The strategy will also give a framework for UNESCO involvement in UNDAF and PRSPs. Given this commitment, UNESCO would like Governments to call upon it for active participation in the design and implementation of their PRSPs and UNDAF.

International Monetary Fund

22. Substantive information received from International Monetary Fund (IMF) is summarized as follows:

23. IMF has taken no specific action regarding the promotion of international cooperation for the realization of the right to development. However, in 1999, it established the Poverty Reduction and Growth Facility (PRGF), as a concrete step to integrate the objective of poverty reduction and growth more fully into the Fund's operations in the poorest member countries. Financial support and policy advice offered through the PRGF have an important role to play as countries seek to implement the right to development.

24. The PRGF includes two important features, which are the integration of poverty reduction with macro-economic policies and the emphasis on good governance. The latter focuses mainly on improving the management of public resources, achieving greater

transparency, active public scrutiny and generally increased government accountability in fiscal management. The Code of Good Practices on Fiscal Transparency points to a number of relevant general objectives.

25. As of March 2001, a total of 77 low-income member countries are eligible for PRGF assistance. Eligibility is based principally on a country's income per capita and eligibility under the International Development Association (IDA). An eligible country may borrow up to a maximum of 140 per cent of its IMF quota under a three-year arrangement, although this limit may be increased under exceptional circumstances to a maximum of 185 per cent of quota. The maximum amount does not constitute an entitlement and the amount lent depends on the balance of payments need of the member, the strength of its adjustment programme, its outstanding use of Funds credit, and its record on such use in the past. Loans under the PRGF carry an annual interest rate of 0.5 per cent, with repayment made semi-annually, beginning five and a half years and ending 10 years after the disbursement.

International Labour Organization

26. Substantive information received from International Labour Organization (ILO) is summarized as follows:

27. All the activities of ILO aim at ensuring that development takes place in conditions of human dignity and with respect for the principle of decent work, and thus promote actively the right to development as expressed in the General Assembly Declaration on the same subject.

28. These activities are manifold and based on the ILO legal framework, including the ILO constitution, the Philadelphia Declaration, and other international labour standards adopted by ILO and supervised by ILO bodies. A new instrument adopted in 1998, the Declaration on Fundamental Principles and Rights at Work, is now fully operational and helps to focus ILO efforts in this field. The In-Focus Programme under the Declaration on Fundamental Principles and Rights at Work, receives and channels extrabudgetary funds to projects to ensure the implementation of the four principles covered by the Declaration: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation. The ILO is at present giving preliminary consideration to a possible large-scale programme for the elimination of forced labour.

29. Another important development assistance programme operated by ILO is the International Programme for the Elimination of Child Labour (IPEC), which operates in more than 60 countries and is dedicated to eliminating this scourge.

29. ILO also carries out a great deal of development assistance, in conditions that ensure the integration of human rights in development. In this connection, ILO has taken part actively in the United Nations system discussions on the rights-based approach to development.

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Addendum

1. Following the preparation of the report of the Secretary-General submitted in accordance with Sub-Commission resolution 1999/9, the United Nations Population Fund (UNFPA) submitted a contribution. The substantive information received from UNFPA is summarized below.

2. UNFPA, in its mission statement, emphasizes the universality and indivisibility of human rights, focusing on reproductive rights of women and men and on the promotion of gender equality, equity and the empowerment of women. UNFPA programmes are based on the premise that overall development requires the recognition and exercise of basic human rights, such as the right to reproductive health, and that women must benefit from and participate in development activities as equal partners with men.

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3. UNFPA emphasizes that population and development programmes must focus on meeting the needs and sustaining the rights of the individual. UNFPA recognizes that cultural values can promote or impede human rights in general and the right to development, in particular. Therefore, the Fund stresses the need to identify and strengthen cultural values that would advance human rights and carefully but firmly address those that are less favourable, in the design and implementation of its programmes.

4. UNFPA also contributes to the implementation of the Declaration on the Right to Development through its support for data collection, especially population censuses and household surveys. This support has yielded population-based indicators that have helped create awareness about population and development issues for whole nations, communities and special population groups. It has also helped to identify gaps that exist between women and men in, inter alia, access to education, health and employment.

5. In a continuous effort to promote development activities and respect for all human rights, UNFPA has taken steps to deepen its involvement in United Nations system-wide initiatives in the field of human rights and poverty reduction. UNFPA has also adopted a system for resource allocation that gives priority to the least developed countries, and to the poorest communities within other countries.

6. The programmatic challenges facing UNFPA include the following: helping countries, especially the least developed countries, achieve reproductive health commodity security; meeting the growing demand for reproductive health information and services in both urban and rural areas, especially for the poor; preventing the spread of HIV/AIDS and responding to the reproductive health needs of youth; sensitizing women and girls on their fundamental human rights, including their right to development; and supporting national efforts to collect data and develop population-based indicators to assess progress towards the international development goals of the United Nations conferences of the 1990s and those of the Millennium Declaration.